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New Theories of "Interpretation": The Activist Flight from the Constitution

RAOUL BERGER*

I. INTRODUCTION

In 1978 Paul Brest challenged the assumption that judges are bound by the Constitution, although they have sworn to support it.¹ Before that, Robert Cover thrust aside the Constitution's self-evident meaning in favor of an "ideology" framed by judges to whom "we" have entrusted that function, without, however, pointing to the source of the grant.² Thus emboldened, other activists have followed suit, as John McArthur has recounted in his critique, "Abandoning the Constitution: The New Wave in Constitutional Theory."³ Why the flight? Gerald Lynch explains that the "consequences of insisting" upon adherence to the "original understanding" would be that States need not enforce the Bill of Rights, protect first amendment freedoms, or abandon de jure school segregation, resulting in "the rejection of virtually all of the Supreme Court's fourteenth amendment jurisprudence."⁴ For Lynch, the "touchstone of constitutional theory" is *Brown v. Board of Education*,⁵ which struck down school segregation, violating the framers' intention to leave that issue untouched by the judiciary.⁶ Thus, Lynch begins with the end to justify the means. Cover likewise begins with the same cherished end and chides me for not concluding that what he deems desirable is necessarily constitutional.⁷

* A.B., University of Cincinnati 1932; J.D., Northwestern University 1935; L.L.M., Harvard University 1938; L.L.D., University of Michigan 1978.

1. Brest, *The Misconduct Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224-38 (1980).

2. Cover, Book Review, *NEW REPUBLIC*, Jan. 14, 1978, at 26, 27.

3. 59 TUL. L. REV. 280 (1984).

4. Lynch, Book Review, 63 CORNELL L. REV. 1091, 1094 (1978).

5. *Id.* at 1099 n.32. Charles Black described *Brown* as "the decision that opened our era of judicial activity." C. BLACK, *DECISION ACCORDING TO LAW* 33 (1981).

6. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 117-33 (1977). For citations to activist recognition that the amendment did not require school desegregation, see Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751, 759-60 (1984).

John Burlleigh observed that "every proponent of the [fourteenth] amendment who addressed the question of segregation and antimiscegenation laws denied they would be overturned—and each spoke to racially segregated galleries when he did so." Burlleigh, *The Supreme Court Versus the Constitution*, 50 PUB. INTEREST 151, 154 (Winter 1978). Mark Tushnet remarks that the legislative history "leads one to conclude that school segregation is not unconstitutional," that were we to ask the framers "whether the amendment outlawed segregation in public schools, they would answer 'No.'" Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800 (1983).

7. Cover, *supra* note 2, at 27. Proceeding from my opinion that the results of the desegregation case cannot be undone, Cover concludes that "[i]t is in this recognition of the practical . . . consequences of constitutional symbols that

For all the rivers of ink since spilled by activists—there is a veritable sea of apologies for judicial revisionism⁸—they have not, according to Michael Perry, himself an activist, come up with “a defensible nonoriginalist conception of constitutional text/interpretation and judicial role.”⁹ After a study of seven “representative scholars” who defend extra-constitutional judicial review, Brest, too, has indicated that their results are tailored to their predilections.¹⁰ And in a burst of candor, he pleaded with academe “simply to acknowledge that most of our writings [about judicial review] are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good.”¹¹ McArthur correctly concludes that in general “noninterpretivism is merely a political argument for the values noninterpretivists prefer to those in the Constitution.”¹²

Nevertheless, activists continue their flight from the Constitution, shifting to an ostensibly neutral terrain in a 725-page symposium on “interpretation,”¹³ in which they challenge the “authoritativeness” of the Constitution and of the centuries-old rule that the intention of the lawmaker prevails over the letter of the law.¹⁴ On one side of the debate are the “originalists,” or interpretivists, who maintain that the provisions of the Constitution mean what the Founders intended them to mean—the “original intention.” On the other side are the nonoriginalists, or noninterpretivists, who insist that judges are free to interpret the Constitution in light of what is “good and just” and the like. Because activists frequently make it appear that “originalism” sprang full-armed from the brow of Raoul Berger, I must modestly disclaim the honor, for as Thomas Grey, himself an activist, wrote: “[interpretivism] is a view

a proper beginning point for a book on constitutional law must lie.” *Id.* at 26–27. In other words, an attractive result implies that constitutional power to accomplish it exists; constitutional limits on delegated powers are reduced to “symbols.”

8. See *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981); *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 260 (1981); *Legal Scholarship and Moral Education*, 90 YALE L.J. 955 (1981); *Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983); *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985). While the University of Southern California Law Review symposium is ostensibly devoted to the neutral subject of “interpretation,” Brest lets the cat out of the bag in noting: “Whatever their other differences, the contributors to this symposium are united in their rejection of strict originalist interpretation;” in other words, judges are bound by the original intention. Brest, “*Who Decides?*” 58 S. CAL. L. REV. 661 (1985). Since Brest acknowledges that “[f]undamental Rights adjudication is open to criticisms that it is not *authorized* and not *guided* by the text and original history of the Constitution,” Brest, *infra* note 10, at 1087 (emphasis in original), it is of no moment that only the originalists cry out that the Emperor wears no clothes: “What makes a thing true is not who says it, but the evidence for it.” S. HOOK, *PHILOSOPHY AND PUBLIC POLICY* 121 (1980).

9. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional ‘Interpretation’*, 58 S. CAL. L. REV. 551, 602 (1985). Earl Maltz wrote that “the premises from which the various commentators proceed vary so widely that the achievement of consensus is likely to be impossible. Maltz, *Murder in the Cathedral: The Supreme Court as Moral Prophet*, 8 U. DAYTON L. REV. 623 (1983). John McArthur likewise concludes that “[t]he normative theories addressed to replace the traditional understanding suggest how far we are from developing a new consensus on the Court’s role.” McArthur, *Abandoning the Constitution: The New Wave in Constitutional Theory*, 59 TUL. L. REV. 280, 305 (1984). See also *infra* note 378 and accompanying text.

10. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Scholarship*, 90 YALE L.J. 1063, 1067–89 (1981). A Canadian scholar observes that “American scholars struggle to offer some theoretically valid account of the judicial enterprise.” Hutchinson, *Alien Thoughts: A Comment on Constitutional Scholarship*, 58 S. CAL. L. REV. 701 (1985).

11. Brest, *supra* note 10, at 1109.

12. McArthur, *supra* note 9, at 281.

13. *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985); see also Brest, *supra* note 8.

14. See Berger, *Original Intention in Historical Perspective*, 54 GEO. WASH. L. REV. 101 (1986).

deeply rooted in our history and in our shared principles of political legitimacy. It has equally deep roots in our formal constitutional law.”¹⁵ It is a view that proceeds from the Founders’ unequivocal canon, oft-repeated and never questioned by the Supreme Court, that all federal power must be drawn from the Constitution.¹⁶

II. THE AUTHORITATIVENESS OF THE CONSTITUTION

Never has any Justice denied the authoritativeness of the Constitution. Instead, the Court, which activists would endow with extraconstitutional power, continues to speak as the oracle of the Constitution. As Robert Bork has noted, “The Supreme Court regularly insists that its results . . . do not spring from the mere will of the Justices . . . but are . . . compelled by a proper understanding of the Constitution. . . . Value choices are attributed to the Founding Fathers, not to the Court.”¹⁷ Scholars likewise observe that the Constitution is widely accepted as authoritative;¹⁸ and I know of none prior to Brest and Cover who have disputed its authority.

Inasmuch as activists are breaking lances on behalf of the Court, let the Justices lay down the governing considerations. In 1842 Justice Story wrote, “such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition . . . would . . . entitle the question [of the authoritativeness of the Constitution] to be considered at rest.”¹⁹ Justice Holmes later stated: “If a thing

15. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 705 (1975). Mark Tushnet, no friend of originalism, concedes that it is a powerful theory. Tushnet, *supra* note 6, at 785. It is a view, John Hart Ely agrees, that “stretches back” to Hamilton and Marshall and “seems to enjoy virtually universal contemporary acceptance.” Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399, 412 (1978).

16. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Congress is not empowered to enlarge the jurisdiction of the Supreme Court). See also *infra* note 71 and accompanying text.

17. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 3–4 (1971). Felix Frankfurter wrote to President Franklin Roosevelt: “People have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is *they* who speak and *not* the Constitution.” ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928–1945, at 383 (M. Freedman ed. 1967) (emphasis in original).

18. Justice Story wrote that “courts of justice have uniformly asserted that the Constitution is not the law for the legislature only, but it is the law, and the supreme law, which is to direct and control all judicial proceedings.” J. McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 341 (1971). Henry Monaghan states, “All parties to the interpretation debate, at least in modern times, concede that the Constitution is *authoritative* . . . an incontestable first principle for theorizing about American constitutional law.” Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. REV.* 353, 383 (1981). Michael Perry notes that “Monaghan’s conception of the constitutional text is a fairly common one,” Perry, *supra* note 9, at 555, adding, “[i]t is axiomatic in American political-legal culture that the text of the Constitution ought to play a justificatory role in—be authoritative for—constitutional decision making.” *Id.* at 552. The underlying reasons for this view of the constitution are explained by Burleigh, *supra* note 6. The “Constitution is widely accepted as this nation’s basic source of valid law.” Leedes, *A Critique of Illegitimate Noninterpretivism*, 8 *U. DAYTON L. REV.* 533 (1983). “Support for the Constitution transcends the immediate results of the cases, and is based upon abstract principles that have become engrained in our history and tradition.” McArthur, *supra* note 8, at 329 n.181. “All parties to the interpretation debate, at least in modern times, concede that the Constitution is authoritative . . .” Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 *S. CAL. L. REV.* 603, 606 (1985) (emphasis in original).

19. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 621 (1842). Speaking of a construction by the First Congress, Madison wrote: “No novel construction, however ingeniously devised, . . . can withstand the weight of such authorities, or the unbroken current of so prolonged and universal a ‘practice.’” Letter from James Madison to Joseph C. Cabell (September 18, 1828) 4 *J. ELLIOT, DEBATES IN THE SEVERAL STATE RATIFICATION CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 602 (2d ed. 1836).

has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it"²⁰ Justice Frankfurter rejected the notion that the Court may "say everybody on the Court has been wrong for 150 years. . . . It is not for the Court to fashion a wholly novel constitutional doctrine . . . in the teeth of an unbroken judicial history from the foundation of the Nation."²¹

To begin with the "contemporaneous expositions," Hamilton stated in *Federalist* No. 78:

Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves . . . and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such act.²²

From the outset, Marshall regarded the Constitution as "fundamental" and as a "superior, paramount law, unchangeable by ordinary means."²³ The Framers submitted the Constitution to the people for ratification in order that, in Madison's words, it would be "established by the people themselves."²⁴ "Once the Constitution was ratified," John Hart Ely states, "virtually everyone in America accepted it immediately, as the document controlling his destiny."²⁵ Consequently, as said by Edward Corwin, the "legal supremacy of the Constitution is due to its being the ordinance of the sovereign will of the people."²⁶ To this day, in Brest's words, the Constitution "lies at the core of the American 'civil religion.' Not only judges and other public officials, but the citizenry at large habitually invoke the Constitution to justify and criticize judicial decisions and government conduct."²⁷ Then, too, like a statute that remains in force until it is repealed,²⁸ a Constitution designed to be "permanent" even more clearly continues in effect until the people themselves repeal it. That this view of the Constitution is supported by the people is evidenced by the fact that they have repeatedly amended it. Each amendment is testimony that the Constitution needed change in that particular area, implying that in other respects it was satisfactory. Were the people confronted by a choice between

20. *Jackman v. Rosenbaum*, 260 U.S. 22, 31 (1922).

21. *Green v. United States*, 356 U.S. 165, 192-93 (1958) (Holmes, J., concurring).

22. *THE FEDERALIST* No. 78, at 509 (A. Hamilton) (Mod. Lib. ed. 1937).

23. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803). "As Marshall insists in *Marbury v. Madison*, the Constitution, a solemn act of the people themselves, was made to be *preserved*, and no organ of Government may alter its terms." E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 110 (1934) (emphasis in original).

Recently the Court declared, "we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983).

24. 2 M. FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 93 (1911).

25. Ely, *supra* note 15, at 409.

26. E. CORWIN, *supra* note 23, at 106-07.

27. Brest, *supra* note 1, at 234. That seems to me to be at war with Brest's statement that "the absence of an amendment [cannot] be taken as popular consent to the Constitution as written." Brest, *supra* note 1, at 236.

28. In *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180, 3188-89 (1985), the Court upheld a statute that "has been on the books for over 120 years," which prohibited payments of more than \$10 by veterans to lawyers who represented them in disputes over veterans' benefits, saying that such a law is entitled to "more deference" than judges customarily accord to a federal statute; see also *Braniff v. Nebraska Bd.*, 347 U.S. 590, 596 (1954).

the judges and the Constitution, they would, as Hans Linde observed, opt for the Constitution.²⁹

Little is gained by Larry Simon's explanation that the basis of our Constitution's authority is a widespread "acceptance of several very abstract values, most importantly, democracy, freedom, equality, and justice."³⁰ Patently, not all whites share beliefs that "freedom, equality, justice" require affirmative action. So too, the deep divisions present in the debates over capital punishment, abortion, and school prayer indicate that the people do not proceed from the same "very abstract values." Indeed, Simon acknowledges that his "broad consensus . . . on the abstract principles . . . declines with more specific definition and application of these values," concluding that "[c]onsensus almost completely disappears when specific hypotheticals are considered."³¹ A simpler explanation is that when the people feel that their security or freedom are threatened, they invoke the Constitution as the bulwark of their rights. That fact no more requires "acceptance of several very abstract values" than does a cry for help to the police for protection against an assault. Simon himself recognizes that

the Constitution is authoritative because major American institutional actors such as legislative bodies, courts, and agencies as well as a large segment of the population . . . regard the Constitution as a source of legally controlling rules and norms. Justification of the authoritativeness of the Constitution is, therefore, certainly *not* necessary to its authoritativeness.³²

Nevertheless, Simon argues, "the question whether this is justified can arise, for example, if a dissident challenges the widespread view."³³ But the dissenter, who would challenge the view the nation entertained from the beginning, carries a very heavy burden of proof,³⁴ contrary to activists' demands that "originalists" show why the Constitution is or should be authoritative. When Perry concludes that the argument for judicial activism "*is inconclusive—but for the critics of judicial 'activism' no less than for its partisans,*"³⁵ he overlooks the fact that those who would overturn a settled practice have the burden of proof. He himself has written

29. Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227, 256 (1972).

30. Simon, *supra* note 18, at 615.

31. *Id.* at n.9. Sanford Levinson remarks: "All sorts of occurrences, ranging from communicating ideas to throwing a curve ball, do not require high theoretical self-consciousness for their execution." Levinson, *What Do Lawyers Know (And What Do They Do With Their Knowledge)? Comments on Schauer and Moore*, 58 S. CAL. L. REV. 441, 443 (1985).

32. Simon, *supra* note 18, at 611 (emphasis in original); *see also id.* at 610. Nevertheless, he considers that what "is needed, in the first instance, is an account of why the framers' wishes are or ought to be authoritative." *Id.* at 646. He considers that "the most contemporarily important theory of the Constitution's authority . . . is the authority of moral reasoning." *Id.* That theory, as will be shown, is very vulnerable. Simon suggests that "the Constitution is (and ought to be) authoritative for reasons that inevitably produce the consequence that to some extent it does not have meanings that can be objectively determined." *Id.* at 607. If this means that the Constitution is authoritative because it is opaque, it signifies that the Founders failed dismally in their endeavor. "Vague and uncertain words, more especially Constitutions," Samuel Adams wrote, "are the very instruments of slavery." 3 S. ADAMS, WRITINGS 262 (H. Cushing ed. 1904). Rufus King, one of the Framers, told the Massachusetts Ratification Convention that the Federal Convention sought "to use those expressions that were most easy to understand and least equivocal in their meaning." 3 M. FARRAND, *supra* note 24, at 268. *See also* comments by Caleb Strong, *id.* at 248.

33. Simon, *supra* note 17, at 610.

34. *See supra* notes 19–20 and accompanying text.

35. Perry, *supra* note 9, at 582 (emphasis in original).

that "the principle of electorally accountable policymaking is axiomatic; it is judicial review, not that principle, that *requires justification*."³⁶

Simon speculates that the Founders "would have the wisdom to understand that they were not omniscient" and therefore would not have bound the future to their view of "goodness and justice . . . they simply did not care a great deal . . . what would become of the amendment process."³⁷ The face of the Constitution speaks against him. The provision for two Senators from every State was expressly excepted from the sweep of the amendment power: "no State . . . shall be deprived of its equal Suffrage in the Senate."³⁸ It is simply inconceivable that the states were indifferent to what would happen to this safeguard of State sovereignty in the course of time. Instead, the provision testifies to the Framers' contemplation that article V would be an enduring process. In truth, the Founders were keenly aware that they were framing a Constitution for posterity, for a country that one day would reach from shore to shore. For example, James Wilson said in the Convention: "We should consider that we are providing a Constitution for future generations, and not merely for the peculiar circumstances of the moment."³⁹ And George Mason wrote from the Convention about "the influence which the establishment now proposed may have upon the happiness or misery of millions yet unborn."⁴⁰ Justice Paterson declared: "The Constitution is certain and fixed; it contains the permanent will of the people . . . and can only be revoked or altered by the authority that made it."⁴¹ The provision for amendment was regarded as a "totally new contribution to politics" that would afford flexibility for the unforeseeable future.⁴² When Washington cautioned against "change by usurpation," (for example, change in derogation of the amendment process), as "the customary weapon by which free governments may be destroyed,"⁴³ he was not so much concerned with his contemporaries as with the

36. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 261-63 (1981) (emphasis added).

37. Simon, *supra* note 18, at 645-46. This runs counter to the Founders' utterances. In his Farewell Address, Washington said that the Constitution, "[untill] changed by an explicit and authentic act of the whole People, is sacredly obligatory on all." 35 G. WASHINGTON, WRITINGS 224 (J. Fitzpatrick ed. 1940). That idea had been earlier stated in the Federalist No. 78 at 509 (Mod. Lib. ed. 1937). In the First Congress, Elbridge Gerry said that a power "of giving constructions to the Constitution different from the original instrument . . . would render the most important clause in the Constitution [the amendment provision] nugatory, and one without which, I will be bold to say, this system of government would never have been ratified." 1 ANNALS OF CONGRESS 503 (1789). In the Virginia Convention, Judge Edmund Pendleton stated, "remote possible errors may be eradicated by the amendatory clause in the Constitution . . . the system itself points out an easy mode of removing errors which shall have been experienced." 3 J. ELLIOT, *supra* note 19, at 303. In the Massachusetts Ratification Convention, Dr. Jarvis said, "we shall have in this article an adequate instrument for all the purposes of political reformation." 2 *id.* at 116. And Chief Justice Marshall stated that if the Constitution is not "unchangeable by ordinary means . . . then written constitutions are absurd attempts on the part of the people, to limit a power, in its own nature illimitable." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

38. U.S. CONST. art. V.

39. 2 M. FARRAND, *supra* note 24, at 125. For similar expressions in the Ratification Conventions, see Massachusetts, Randall, 2 J. ELLIOT, *supra* note 19, at 40; General Heath, *id.* at 121; Thacher, *id.* at 142; Connecticut, Law, *id.* at 200; New York, Williams, *id.* at 240, 339; R. Livingston, *id.* at 344; South Carolina, Tweed, 4 J. ELLIOT, *supra* note 19, at 333; Charles Pinckney, *id.* at 335; North Carolina, Iredell, *id.* at 228.

40. 3 M. FARRAND, *supra* note 24, at 33.

41. *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 303, 308 (C.C.D. Pa. 1795); see also P. KURLAND, WATERGATE AND THE CONSTITUTION 7 (1978).

42. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1789, at 613 (1969).

43. 35 G. WASHINGTON, WRITINGS 228-29 (J. Fitzpatrick ed. 1940).

distant future. The Court never has remotely exhibited anything like Simon's cavalier indifference to the amendment process. Instead it has insisted that article V reserved alteration of the Constitution exclusively to the people, acting in prescribed fashion.⁴⁴ Brest argues that "the formal process of amendment is too cumbersome."⁴⁵ By this logic, compliance with the law may be waived if it is "too cumbersome." It ill becomes activists to urge that such cumbersomeness justifies judicial license while maintaining that the only way to overrule judicial arrogation is by employment of that very cumbersome process.

Perry takes a different approach: "To say that the constitutional text is 'authoritative' for constitutional decision-making means that judges justify their constitutional decisions at least in part by reference to the constitutional text, and that they do so because they believe they should . . . But why do judges believe they should justify their constitutional decisions by reference to constitutional text?"⁴⁶ The short answer is that they owe their positions to the Constitution, which declares that it is the "supreme law," and which they are sworn to support, as Marshall saw from the outset.⁴⁷ If the Constitution is not "authoritative," whence do they derive *their* authority? Thomas Gerety notes "an important convention . . . [is] simply that there must be a text for any assertion of the power of judicial review. . . . [T]o say that the judge has no text is to say that he has no authority at all."⁴⁸

Perry rejects as the "legal grüdnorm" the proposition that the Founders could in 1787 "definitively order relationships" to be binding "until changed by amendment," because "[t]he supreme criterion of legal validity in our rule of recognition seems to be 'decisions of the Supreme Court interpreting the text of the Constitution.'"⁴⁹ If that be assumed, a long line of cases lays down the rule that lawmaking is beyond the judicial province,⁵⁰ the chief point in issue. Other cases

44. *Hawke v. Smith*, 253 U.S. 221, 227 (1920); *McPherson v. Blacker*, 146 U.S. 1, 36 (1892).

45. Brest, *supra* note 1, at 236.

46. Perry, *supra* note 9, at 553-54.

47. Marshall asked, "Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). Perry argues that judges "are not sworn to uphold any particular conception of the Constitution." Perry, *supra* note 9, at 588 n.107. But a constitution that a judge may revise "forms no rule for his government." Perry urges that judges are not sworn to uphold the "originalist conception of the constitutional text." *Id.* However, reliance on the Framers' intention was a basic presupposition, taken over from the common law. See *infra* notes 179-85 and accompanying text.

President Washington appealed to the original understanding in maintaining that a treaty did not require consent of the House, citing to the Journal of the convention, which stated "'that no Treaty should be binding on the United States which was not ratified by a law,' and that the proposition was explicitly rejected." 3 M. FARRAND, *supra* note 24, at 371. Although Madison considered that the meaning of the Constitution was more to be sought in the records of the Ratification Conventions than in those of the Federal Convention, he nevertheless turned to the understanding of the Framers. *Id.* at 458, 464, 473, 534.

Richard Kay observes:

To implement real limits on government the judges must have reference to standards which are external to, and prior to, the matter to be decided. This is necessarily historical investigation. The content of those standards are set at their creation. Recourse to "the intention of the framers" in judicial review, therefore, can be understood as indispensable to realizing the ideas of government limited by law.

Kay, Book Review, 10 CONN. L. REV. 801, 805-06 (1978).

48. Gerety, *Doing Without Privacy*, 42 OHIO ST. L.J. 143, 145 (1981).

49. Perry, *supra* note 9, at 576.

50. See *infra* text accompanying notes 65-71.

require compliance with the amendment process.⁵¹ Were there cases to the contrary, they would, as Robert Bork wrote, “themselves require justification and cannot be taken to support the principle advanced to support them.”⁵² “The practice of a ruling power in the state,” Chief Justice Denman stated, “is but a feeble proof of its legality;”⁵³ one who arrogates power is poor authority for the usurpation. On behalf of his rule of recognition, Perry argues that while “many citizens and officials questioned . . . [its] legitimacy (in terms of democratic theory),” none questioned “the legal validity of the Court’s decision in *Roe v. Wade*.”⁵⁴ The reason is that the Court has led the people to believe that when it speaks, its voice is that of the Constitution and not that of the Justices.⁵⁵ Trust in the Court moves the people to yield their sentiments to what they believe to be the mandate of the Constitution.⁵⁶ John Burleigh explained: “The authority of nine unelected jurists to strike down laws would be unacceptable in a democratic polity, one that is supposed to be ‘a government of laws, and not of men,’ unless judicial review were believed to be guided by a faithful attempt to interpret the Constitution, the highest law of the land.”⁵⁷ The Court continues to speak as the oracle of the Constitution because, as Bork observes: “The way an institution advertises tells you what it thinks its customers demand.”⁵⁸

III. INTERPRETATION OF THE CONSTITUTION

A. Theories Underlying Constitutional Interpretation

At the outset it bears reemphasis that the “interpretation” issue does not arise *in vacuo*, but represents an effort, to borrow from McArthur, to “bridg[e] the gap between received theories of interpretation” and the activist view that “the Court is not limited by the old theories.”⁵⁹ The enterprise, in other words, proceeds from the activist drive to uphold judicial revision of the Constitution.

“[W]hat,” asks Perry, “does it mean to interpret the text?”⁶⁰ Dr. Johnson’s Dictionary defined “interpret” in 1755 thus: “To explain; to translate; to decipher; . . . to expound.”⁶¹ So it remains today: “To expound the meaning of; . . . to elucidate; to explain.”⁶² Invariably the Framers discussed the judicial role in terms of “expounding” the Constitution.⁶³ Corwin, commenting on the exclusion of the Justices from a Council of Revision that would share the President’s veto,

51. See *supra* note 44.

52. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASHINGTON U.L.Q. 695, 698.

53. *Stockdale v. Hansard*, 112 E.R. 1112, 1171 (Q.B. 1839).

54. Perry, *supra* note 9, at 577 (emphasis in original).

55. See *supra* note 17.

56. Solicitor General Robert H. Jackson wrote: “This political role of the Court has been obscure to laymen—even to most lawyers.” R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* at xi (1941).

57. J. Burleigh, *The Supreme Court v. The Constitution*, 50 PUB. INTEREST 151, 154 (1978).

58. Bork, *supra* note 17, at 4.

59. McArthur, *supra* note 9, at 332.

60. Perry, *supra* note 9, at 552.

61. 1 S. JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (2d ed. 1755).

62. OXFORD UNIVERSAL DICTIONARY 1031 (3d ed. 1964).

63. For citations of “Expounding the Law,” see R. BERGER, *CONGRESS VS. THE SUPREME COURT* 409 (1969).

correctly concluded that the Framers acted on the principle "that the power of *making* ought to be kept distinct from that of *expounding* the law."⁶⁴ That principle was rooted in the common law and was recognized time and again by the Court. Francis Bacon cautioned judges "to remember that their office is . . . to interpret law, and not to make it."⁶⁵ James Wilson, second only to Madison as an architect of the Constitution, instructed a judge to "remember that his duty and his business is, not to make the law, but to interpret and apply it."⁶⁶ In *Luther v. Borden*,⁶⁷ Chief Justice Taney declared: "It is the province of a court to expound law, not to make it."⁶⁸ This principle was at the heart of the separation of powers, as Chief Justice Marshall perceived: "The difference between the departments undoubtedly is, that the legislature *makes*, the executive *executes*, and the judiciary *construes* the law."⁶⁹ It is basic to federalism whereunder the States were shielded from federal exercise of ungranted power, as the tenth amendment hammered home.⁷⁰ Understandably, Justice Story emphasized, "we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution."⁷¹

Regardless of what "interpretation" might mean, one thing it plainly does not mean—"making law." Consequently, when Perry asserts that "the tradition has never really settled, even provisionally, on what the judicial role should be,"⁷² he overlooks the indubitable tradition that it should *not* be "lawmaking," which is the very function challenged by "originalists." Quite rightly, therefore, does Michael Moore say that "[t]he place to start in any normative discussion about what should go into a theory of interpretation is that basic set of values that justifies the judiciary in having a limited role in a democracy such as ours."⁷³ A central value is the presupposition that judges were excluded from making law, and any theory of judicial interpretation that embraces the lawmaking function does violence to that design. Simon recognizes that this method of interpretation may be regarded as authoritative

64. E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 43-44 (1963); see also R. BERGER, *supra* note 6, at 300-03.

65. F. BACON, *SELECTED WRITINGS* 138 (Mod. Lib. ed. 1955).

66. 2 J. WILSON, *WORKS* 502 (R. McCloskey ed. 1967).

67. 48 U.S. (7 How.) 1 (1849).

68. *Id.* at 41.

69. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) (emphasis added). Chief Justice Waite reiterated that the Court's "province is to decide what the law is, not to declare what it should be." *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874). The separation of powers, a present-day jurisprudence notes, requires that "the legislature should make the laws and the courts merely apply them." Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 314 (1985). Walter Benn Michaels comments: "The 'non-originalist' interpreter isn't interpreting an old text, but either writing a new one or imagining that someone else has written it." Michaels, *Response to Perry and Simon*, 58 S. CAL. L. REV. 673, 678 (1985).

70. R. BERGER, *supra* note 63, at 260-63; R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (forthcoming in 1987). For example, "The Bill of Rights was intended to weaken the federal government; apply the Bill of Rights to the states through the due process clause and you weaken the states tremendously by handing over control of large areas of public policy to federal judges. . . . It is hard to believe that this was intended by all the state legislators whose votes were necessary to ratify the [fourteenth] amendment." R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 194-95 (1985). The intense attachment of the 1787 Framers to state sovereignty speaks loudly from the conventions' records.

71. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 48 (1820) (Story, J., dissenting).

72. Perry, *supra* note 9, at 575.

73. Moore, *supra* note 69, at 313. Moore alludes to the rule of law virtue: "[J]udges should not dispense justice in some ad hoc case-by-case basis." *Id.* Frederick Schauer remarks that "Constitutional adjudication exists within a framework held together by acceptance of the Constitution as this nation's constitutive and governing instrument." Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 403-04 (1985).

"if relevant members of society"—who can be more relevant on this issue than the Court itself?—"take an internal attitude toward a particular interpretative methodology—that is if they believe it is *the* authoritative method."⁷⁴ True, Simon considers that "[t]here is no widespread consensus or internal attitude about the proper method of constitutional interpretation,"⁷⁵ but he is contradicted on this issue by the historical facts.

There is far less consensus among activists about a theory of interpretation: juridical progress, Larry Alexander suggests, must wait on a satisfactory theory of interpretation,⁷⁶ and the Southern California symposium⁷⁷ parades as many theories as writers. For centuries, Anglo-American judges, acting after the common law case-by-case method of adjudication, have interpreted documents without waiting for a grand, over-arching theory of interpretation.⁷⁸ "While the Germans are tormenting themselves with the solution of philosophical problems," said Goethe, "the English, with their great practical understanding, laugh at us, and win the world."⁷⁹ The circumstances recall a story by Delmore Schwartz about a group of New York writers who decided to have a party in the winter of 1930. It opens with a bitter dispute between the host and one of his cronies "about who should be invited to the party. 'Since both of them were intellectuals,' Schwartz noted, 'both resorted to theories about the nature of a party,'"⁸⁰ lending point to Ludwig Wittgenstein's admonition, "Don't ask for the meaning, ask for the use."⁸¹

"To interpret something," Simon remarks, "is to give meaning to it."⁸² That seems to me to depart from the connotation of "interpret." "Give" denotes the grant of something to one who obtains something he did not have before, whereas "to interpret" is to ascertain, not to add. Simon himself cautions that if "the giving of meaning is to be called 'interpretation,'" then the word "stop" cannot be read as "'go' without any contextual justification."⁸³ This does not carry us very far because Simon is prepared to swallow some very far-fetched "interpretations," for example, "a fine of \$1.00 for criticizing the President" would violate the eighth amendment's prohibition of "cruel and unusual punishment," because "so cherished a freedom" is embodied in the free speech clause.⁸⁴ Yet the accompanying fifth amendment

74. Simon, *supra* note 18, at 613 (emphasis in original).

75. *Id.*

76. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 4-5 (1981).

77. *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985).

78. See Levinson, *supra* note 31.

79. J.P. ECKERMANN, WORDS OF GOETHE (CONVERSATIONS WITH GOETHE) 307 (1933). Jefferson also "was an eighteenth century empiricist, opposed to generalization and concentrating on particular realities." G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE, at xxii (1978). Hyppolyte Taine noted that the English "have been positive and practical; they have not soared above the facts." 4 H. TAINE, HISTORY OF ENGLISH LITERATURE 499 (1965). William James was "impatient with the awful abstract rigamarole in which our philosophers obscure the truth." J. BARZUN, A STROLL WITH WILLIAM JAMES 125, 133, 137 (1983). To this day, "general theories make [even] academic lawyers uncomfortable." Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 490, 549 (1985).

80. Atlas, *The Changing World of New York Intellectuals*, N.Y. Times, Aug. 25, 1985, § 6 (Magazine), at 22.

81. J. BARZUN, *supra* note 79, at 299.

82. Simon, *supra* note 18, at 620.

83. *Id.*

84. *Id.* at 621.

contemplates that a person may be deprived of life after a due process trial. If he may be sentenced to death, he may be fined \$1, be the offense what it may, without violating the "cruel and unusual punishment" phrase. So, too, Simon considers that the "requirement that the President be 'natural born' could be held no longer applicable [because it is] inconsistent with . . . more nondiscrimination values of the Constitution."⁸⁵ In truth, the framers of the fourteenth amendment rejected abolition of *all* discrimination and only barred several particular forms.⁸⁶ Thus Simon would abrogate the express "natural born" limit in favor of a nonhistorical theory of across-the-board nondiscrimination. Such examples set at naught his disclaimer of a suggestion "that there are no limits on the range of likely Supreme Court interpretive possibilities."⁸⁷ To read "natural born" as *not* meaning natural born is unlimited enough. In essence, Simon would endow judges with the very unlimited discretion that was anathema to the Founders,⁸⁸ and which we should distrust no less because judges are unelected and unaccountable to the electorate. Such accountability, as Perry observed, is an "axiom" of our democratic system.⁸⁹

The "constraints" suggested by Simon are pitifully inadequate: "No judge wants to be thought incompetent under prevailing professional craft standards, and this may constrain the reasoning process used in reaching a decision"⁹⁰ Commentators have assailed various court decisions as "wanton," "lunatic," "inconsistent," and as "a veritable shambles."⁹¹ How little that "constraint" deters is illustrated by Chief Justice Warren's decision in *Bolling v. Sharpe*,⁹² in which he read the equal protection clause of the fourteenth amendment into the fifth, reasoning after deciding (erroneously) that the fourteenth amendment "prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."⁹³ Ely, a Warren admirer, wrote that the decision is "gibberish both syntactically and historically."⁹⁴ An even more important constraint in Simon's eyes derives from the "public agenda," that is "[s]ome possible states of the world . . . remain in the realm of the unthinkable."⁹⁵ The Court's treatment of death penalties illustrates that it can bring the "unthinkable" to pass. A leading advocate of abolition of death penalties wrote that prior to 1972 "[S]ave for a few eccentrics and visionaries" the death penalty was "taken for granted by all men . . . as a bulwark of social order."⁹⁶ For

85. *Id.*

86. R. BERGER, *supra* note 6, at 163-65; see also *infra* text accompanying notes 167-72.

87. Simon, *supra* note 18, at 627.

88. See *infra* text accompanying notes 186-88.

89. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 9 (1982).

90. Simon, *supra* note 18, at 628.

91. See Berger, *Paul Brest's Brief for an Imperial Judiciary*, 40 MD. L. REV. 1, 15 nn.81-83 (1981). As to the quality of the Court's "reason giving," see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

92. 347 U.S. 497 (1954).

93. *Id.* at 500. Having reversed the Framers' intention to exclude segregation from the fourteenth amendment, symmetry required that equal protection be read into the fifth, compounding the felony.

94. J.H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 32 (1980).

95. Simon, *supra* note 18, at 628.

96. H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 12 (1977).

175 years no court had held that a death penalty was unconstitutional.⁹⁷ Suddenly the Supreme Court ordained that jury discretion in administration of the penalty was unconstitutional,⁹⁸ and shortly thereafter held that rapists and accomplices may not be sentenced to death,⁹⁹ a theretofore "unthinkable" result. Simon acknowledges that "none of these factors will have any significant effect in constraining a Justice's interpretative options."¹⁰⁰ Adherence to the long-established doctrines that judges have no law-making power, that they must effectuate the clear intention of the Framers, would far more effectively serve to restrain the courts' exercise of extraconstitutional power.¹⁰¹

B. "Good and Just" Interpretation: The Role of the Court

In "modern times," Simon notes, judges have been most influenced by what is "good and just," that is, by "moral reasoning"; these are the criteria to guide constitutional interpretation.¹⁰² That was not the view of Justice Holmes:

[I]t is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time. . . . Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.¹⁰³

Simon observes, however, that "[d]uring much of this century" (and of the nineteenth century as well) many "constitutional scholars and judges" have been "under the sway of the sovereign public worldview," contemplating that the Justices' discretion would be "greatly constrain[ed]."¹⁰⁴ That view posits that it is for the people, acting through their legislatures, to determine what is good and just. Once that is determined, considerations of what is good and just "are irrelevant, . . . [because] [t]hat is what democracy is all about."¹⁰⁵ In this view, it follows that the judicial role "ought to be limited or constrained in some way to assure that the Justices did not end up doing what they think is good or just and calling

97. *Id.* at 81.

98. *Furman v. Georgia*, 408 U.S. 238 (1972) (a five to four decision). Fourteen months earlier the Court had held in *McGautha v. California*, 402 U.S. 183 (1971) that a jury had untrammelled discretion to pronounce a death verdict.

99. *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982). Inasmuch as "[c]apital punishment is very popular all over the country," Sherrill, *Death Row on Trial*, N.Y. Times, Nov. 13, 1983, § 6 (Magazine), at 80, this treatment of death penalties alone discredits Simon's reference to "the supposed threat to 'democracy' posed by a court with wide-ranging interpretive discretion," Simon, *supra* note 18, at 644. Similar opposition to the popular will is exemplified by the school prayer decisions. See *infra* note 110. What is democracy but the right of the people to govern themselves? Where was that right surrendered to unelected, unaccountable judges?

100. Simon, *supra* note 18, at 628.

101. Robert Bennett considers that "the primary mechanisms of [judicial] constraint are just what judicial opinions suggest: deference to precedent, to original intentions, and to the judgment of politically responsible agencies." Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647, 656 (1985).

102. Simon, *supra* note 18, at 618, 609. Simon acknowledges that "recognition that the authority of the Constitution is that of moral reasoning solves very few, if any, of the difficult problems." *Id.* at 619. Bennett emphasizes "the importance of confining the role of moral reasoning so that it is a constitution and not a vision or morality we are interpreting." Bennett, *supra* note 101, at 648.

103. O.W. HOLMES, COLLECTED LEGAL PAPERS 171-72 (1920).

104. Simon, *supra* note 18, at 606.

105. *Id.*

it constitutional law.”¹⁰⁶ The Founders conceived the judicial role in just this way. A judge, wrote Cardozo, “is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness.”¹⁰⁷ First and last it needs to be asked: Whence do the Justices derive power to supplant the Framers’ determinations by their own moral ideas? For that is what “moral reasoning” boils down to.¹⁰⁸

Simon recognizes that “what is ‘good’ or ‘just’ will usually be controversial,” and that “the people would without doubt disagree about which particular interpretations are good or just.”¹⁰⁹ The people, in fact, differ not only among themselves, but also with the Court, as exhibited by the diversity of opinion on the death penalty and school prayer issues.¹¹⁰ Moreover, as Simon observes, “moral theory today is a ‘conceptual melange.’”¹¹¹ Perry, who approaches the matter from the standpoint of shared beliefs and aspirations and the companion “political morality” viewpoint, observes that “[p]olitical-moral philosophy, after all, is in a state of serious disarray. . . . Many different and competing conceptions of justice clamor for our attention. . . . Each conception confronts serious problems.”¹¹² Simon acknowledges that, “given the range of legitimate disagreement about the requirements of political morality, the ‘correct’ or ‘authoritative’ interpretation will often depend on the interpreter,” and that “[d]ifferent Justices” may have “very different beliefs about justice,” about “what is good or just.”¹¹³ In the upshot, an all but illimitable discretion is lodged in the Justices, precisely what the Founders sought to avoid. Chief Justice Warren’s famous question, “Is it fair?” is illustrative. His worshipful biographer, G. Edward White, concludes that Warren’s justifications for a result were often conclusory statements of what *he* perceived to be moral imperatives, and that “when one divorces Warren’s opinions from their ethical premises, they evaporate.”¹¹⁴ To conclude, therefore, that the original intention is met by “powerful and competing

106. *Id.* at 605.

107. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921).

108. McArthur remarks that the noninterpretivists are “attempting to replace one moral system with another that they prefer.” McArthur, *supra* note 9, at 324 n.173.

109. Simon, *supra* note 18, at 614, 618.

110. Judge Richard Posner notes that “the national consensus is in favor of, not against, capital punishment.” R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 194 (1985). “The controversy that surrounds many of the Court’s human rights cases—the death penalty and abortion cases are good examples—shows that neither the public nor the courts share a consensus on what Perry views as moral issues.” McArthur, *supra* note 9, at 291. See *supra* note 99.

111. Simon, *supra* note 18, at 619.

112. Perry, *supra* note 9, at 592–93.

113. Simon, *supra* note 18, at 614, 624. Cf. Brest, *supra* note 10 and accompanying text. Judge Posner observes, “decision according to personal preference is so widely thought to be wrong that no judge would dare admit that he was deciding cases on such a basis.” R. POSNER, *supra* note 110, at 203–04.

Reliance on judges’ insights into the “good and just” is all the less justified when, as Judge Posner notes, law clerks have virtually taken over the bulk of opinion writing. R. POSNER, *supra* note 110, at 104. Any one who has attempted to wrestle an idea down on paper knows how toilsome is the development of insights, corrected at every step as writing brings problems to the surface. Minimally, as Posner notes, “whoever does the basic drafting of a document . . . will have a big impact on the final product.” *Id.* at 107. As a result, neophyte lawyers, just out of law school, play a preponderant role in deciding what is “good and just” for the nation!

114. G.E. WHITE, *EARL WARREN: A PUBLIC LIFE* 30, 367 (1982) (emphasis added). Posner remarks: “Whatever this is, it is not judicial craftsmanship. To identify one’s personal ethical preferences with natural law and natural law with constitutional law is to make constitutional adjudication a projection of the judge’s will. And as the courts move deeper into subjects on which there is no ethical consensus, judicial activism in the form attributed by Professor White to Chief Justice Warren becomes ever more partisan and parochial, lawless, and finally reckless.” R. POSNER, *supra* note 110, at 214–15.

claims of no less status about what is good or just for society" is to ignore the contrariety of opinion that envelops "political morality."¹¹⁵ On the other hand, "originalism," to quote Thomas Grey, is a view that is "of compelling simplicity . . . deeply rooted in our history."¹¹⁶ More importantly, originalism serves to restrain the judiciary, as the Founders intended, and to leave the people's destiny in their own hands.¹¹⁷

A seminal constitutional scholar, James Bradley Thayer, considers that the Court "cannot rightly attempt to protect the people, by undertaking a function not its own."¹¹⁸ Brest points out that "judges are far from a representative cross section of American society," and he adds, the "net effect" of acquiescence in the "Court's claim to be the ultimate interpreter of the Constitution . . . is to systematically exclude citizens and their representatives from some of the most fundamental decisions of the polity."¹¹⁹ In short, the people are deprived of their rights to rule themselves when the judiciary promotes its personal views of morality under the guise of constitutional interpretation.

Manifestly the several theories of interpretation under discussion aim to invest courts with unfettered discretion. How does this compare with the Founders' design? At the adoption of the Constitution, Parliament, not the courts, had the last word. To challenge Parliament, the colonists invoked the shades of Coke for judicial review.¹²⁰ It was, however, one thing to exalt the courts over Parliament, and quite another to permit American courts to override the state legislatures. The colonists had put their trust in their assemblies because they could elect and oust them; unfeeling judges had been saddled on them by the Crown and, as Wilson wrote, were regarded with "aversion and distrust."¹²¹ So when judges of the nascent states sought to set legislation aside, they touched off stormy controversies, campaigns for removal, of which the Constitutional Convention was aware.¹²² Not for nothing did Hamilton assure the ratifiers that the judiciary was "the weakest of the three departments of power."¹²³ Dreading the greedy expansiveness of power, the Founders resorted to a written Constitution to limit the delegations, for example, as Marshall explained, to restrain the legislature within "defined and limited" boundaries.¹²⁴ Even this limited jurisdiction aroused vigorous opposition, and in the Virginia Ratification Convention Marshall argued that there was no one else to restrain Congress from going "beyond

115. Simon, *supra* note 18, at 641.

116. See *supra* text accompanying note 15.

117. See Kay, *supra* note 47.

118. J. THAYER, JOHN MARSHALL 109 (1901).

119. Brest, *supra* note 8, at 664, 670.

120. R. BERGER, *supra* note 63, at 23-28.

121. 1 J. WILSON, WORKS 292 (R. McCloskey ed. 1967).

122. R. BERGER, *supra* note 63, at 38-42.

123. THE FEDERALIST No. 78, at 504 (A. Hamilton) (Mod. Lib. ed. 1937).

124. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Marshall asked: "To what purpose are powers limited . . . if the limits may, at any time, be passed by those intended to be restrained?" *Id.* The "temper of the times," as Judge Posner observed, "believed in limited government and above all in limited national government." R. POSNER, *supra* note 110, at 49.

the delegated powers.”¹²⁵ In the words of James Bradley Thayer and Judge Learned Hand, the courts were to *police* the constitutional boundaries.¹²⁶ *Within* those boundaries, Justice Iredell stated, legislatures were not controllable by the Courts.¹²⁷

By settled practice, we have seen, judges were excluded from lawmaking, and the Convention excluded them from a share in legislative policymaking on the ground that they had no special competence. Furthermore, the Founders had a “profound fear of judicial independence and discretion.”¹²⁸ Hamilton thus found it necessary to assure the Ratifiers that judicial authority was confined to “certain cases *particularly specified*,” whereby “[t]he expression of those cases marks the *precise limits*, beyond which federal courts cannot extend their jurisdiction.”¹²⁹ In concrete terms, the jurisdiction of cases “arising under” the Constitution does not “extend” to cases arising *outside* of it. These were not matters of legal theology, but sprang from the jealous attachment of the States to their own sovereignty. The states remained the cherished first bastion. It was because many, like Grayson in Virginia, felt that “State courts were the principal defense of the States” that stubborn insistence on state court arbitrament of federal-state conflicts was ultimately expressed in the Act of 1789, which left initial review of challenged state laws to state courts.¹³⁰ The “rights” constructed by the “modern” Court diminish state control over local, internal affairs.¹³¹ One who studies the records of the several Conventions and *The Federalist* is constrained to conclude that activist efforts to redraw the federal jurisdiction violate the Constitution. As becomes “philosophers,” activists make virtually no mention of the constitutional history,¹³² a confession that it reads against them. Justice Harlan summed up tellingly: “When the Court disregards the express intent and understanding of the Framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.”¹³³

125. 3 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 553–54 (2d ed. 1836).

126. Thayer, *The Origins and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893); L. HAND, *THE BILL OF RIGHTS* 31, 66 (1962).

127. *Ware v. Hylton*, 3 U.S. (3 Dalt.) 199, 266 (1796). In *Trop v. Dulles*, 356 U.S. 86 (1958), Justice Frankfurter regarded the Court's function to ascertain “whether legislation lies clearly outside the constitutional grant of power,” and stressed the “difference between limits of power and wise exercise of power.” *Id.* at 120.

128. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1789*, at 298 (1969). Justice Story admirably quoted Sir James Mackintosh: “there is not . . . in the whole compass of human affairs, so noble a spectacle as that which is displayed in the progress of jurisprudence, where we may contemplate the cautious and unwearied succession of wise men through a long course of ages, withdrawing every case, as it arises, from the dangerous power of discretion, and subjecting it to inflexible rules.” J. McCLELLAN, *supra* note 18, at 346–48. Story praised the “many rules . . . for the construction of statutes, which the extreme solicitude of the common law to introduce certainty, and to limit the discretion of judges, has incorporated into its maxims. . . . [N]o court would now be bold enough, or rash enough, to gainsay or discredit them.” *Id.* at 362–63.

129. *THE FEDERALIST* No. 83, at 541 (A. Hamilton) (Mod. Lib. ed. 1937) (emphasis added).

130. R. BERGER, *supra* note 63, at 260–63.

131. Justice Miller refused to embrace a construction of the fourteenth amendment that would subject the states' local concerns to “the control of Congress . . . in the absence of language which expressed such a purpose too clearly to admit of doubt.” *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1872).

132. For a critique of the few sorry attempts to controvert my collocation of the historical materials, see Berger, *The Scope of Judicial Review and Walter Murphy*, 1979 WIS. L. REV. 341 (1979); Berger, *Soifer to the Rescue of History*, 32 S. CAR. L. REV. 427 (1981); Berger, *Paul Dimond “Fails to meet Raoul Berger on Interpretivist Grounds”*, 43 OHIO ST. L.J. 285 (1982).

133. *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., dissenting in part).

IV. THE "ORIGINAL INTENTION" OF THE FOUNDERS

"Interpretation" and the "original intention" long have been closely allied. Perry remarks, however, "[o]ne is free to stipulate a definition of 'interpretation' such that 'to interpret a text' means 'to search for what the author(s) of the text intended the text to mean.'"¹³⁴ But he rejects the stipulation because "[a]s a matter of ordinary language, 'interpretation' has no single canonical, meaning."¹³⁵ Yet Bouvier's Law Dictionary, apparently reflecting Francis Lieber's views on "hermeneutics," speaks of "interpretation" as seeking the "meaning which those who used [the words] were desirous of expressing."¹³⁶ Be it assumed that in its "ordinary" sense "interpretation" leaves the interpreter at large, we are in the field of legal discourse where ordinary words can take on a technical meaning and become words of art.¹³⁷ That, as Bouvier indicates, is the case with the interpretation/intention distinction. "It is currently fashionable," Frederick Schauer observes, "to make sport of the ability to determine original intent with any degree of certainty."¹³⁸ Brest flatly adds, that "[i]t simply is not possible . . . to determine the adoptor's specific intentions."¹³⁹ History refutes the exaggerated claim in the shape of what Justice Harlan justly described as the framers' "irrefutable and unrefuted" exclusion of suffrage from the fourteenth amendment, which the Warren Court overruled in the reapportionment cases.¹⁴⁰ It will profit us to descend from the thin air of philosophy to the *terra firma* of some historical facts.

In a nutshell, Justice Brennan observed that seventeen of nineteen northern states had rejected black suffrage between 1865 and 1868.¹⁴¹ At the outset, Roscoe Conkling, a member of the Joint Committee on Reconstruction of both houses, stated it would be "futile to ask three quarters of the States to do . . . the very thing which most of them have already refused to do."¹⁴² Another member of that Committee, Senator Jacob Howard, said that "three-fourths of the States of this Union could not

134. Perry, *supra* note 9, at 572 n.68.

135. *Id.*

136. BOUVIER'S LAW DICTIONARY (F. Rawle ed. 1897).

137. Justice Harlan stated: "We should not assume that Congress . . . used the words 'advocate' and 'teach' in their ordinary dictionary meanings when they had already been construed as words of art carrying a special and limited connotation." *Yates v. United States*, 354 U.S. 298, 319 (1957).

138. Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 437 n.99 (1985). Michael Moore considers that difficulty of ascertainment of intentions is only a "problem of evidence, of verifying just what intentions a person has on a given occasion. The surmountability of these problems is shown by the law of crimes, torts, and contracts, where we presuppose the existence and discoverability of the real intentions of the individuals all of the time." Moore, *supra* note 69, at 350. Simon converts this into an inquiry into the "state of mind" of the draftsman. Simon, *supra* note 18, at 638. Psychoanalysis is alien to such inquiry. Roughly speaking, "if a man makes a [reckless] statement . . . he is liable, whatever was the state of mind." O.W. HOLMES, *THE COMMON LAW* 136 (1923). My own studies have focused on the framers' explanatory statements, not on what they may have believed. See Berger, *Judicial Review: Countercriticism in Tranquility*, 69 NW. U.L. REV. 390, 395-96 (1974).

139. Brest, *supra* note 8, at 662.

140. *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970) (Harlan, J., dissenting in part). Louis Lusky, an ardent activist, considers that Harlan's demonstration is "irrefutable and unrefuted." Lusky, Book Review, 6 HASTINGS CONST. L.Q. 403, 406 (1979). Gerald Gunther wrote that "most constitutional lawyers agree" that "the 'one-person-one-vote' ruling . . . lacks all historical justification." Gunther, Book Review, WALL ST. J., Nov. 25, 1977, at 4.

On certain issues, Schauer writes, "I can still conclude that the evidence of original intent inclines much more away from the current doctrine than toward it." Schauer, *supra* note 138, at 437 n.99.

141. *Oregon v. Mitchell*, 400 U.S. 112, 256 (1970) (Brennan, J., dissenting in part).

142. CONG. GLOBE 39th Cong., 1st Sess. 358 (1866).

be induced to vote to grant the right of suffrage.”¹⁴³ The chairman of the Committee, Senator William Fessenden, said of a suffrage proposal that “there [is not] the slightest probability that it will be adopted by the States and become part of the Constitution of the United States.”¹⁴⁴ And the unanimous report of the Committee doubted that “the States would consent to surrender a power that they had always exercised, and to which they were attached,” and so they thought it best to “leave the whole question with the people of each State.”¹⁴⁵ That such was the vastly preponderant opinion is confirmed by a remarkable fact: during the pendency of ratification, and despite radical opposition to the readmission of Tennessee because its constitution excluded Negro suffrage, the House voted 125 to 12, and the Senate 34 to 4, to readmit that state to the Union.¹⁴⁶ Further confirmation is furnished by section 2 of the fourteenth amendment, which provided that representation of a state in the House should be reduced in proportion to the number of male inhabitants excluded from voting. That limited sanction against discrimination in voting bars an inference that it was prohibited altogether.¹⁴⁷ The fifteenth amendment, its framers explained, was adopted to fill the gap left by the failure of the fourteenth to ban discriminatory exclusion from suffrage.¹⁴⁸

Summing up, Robert Bork states: “The principle of one man, one vote . . . runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from Colonial times up to the day the Court invented the new formula.”¹⁴⁹ This history refutes Simon’s assertion that “‘objective’ criteria for both the interpreter and the Court critic interested in the correctness of the decision do not exist.”¹⁵⁰ Simon’s citation of *Reynolds v. Sims*¹⁵¹ as a case in which “the Justices were not constrained to reach the one-person-one-vote holding,”¹⁵² and the decision of which could have gone either way, is oblivious to the “objective criteria” which clearly demonstrate that the Court had no business dealing with the matter at all. Nor will it do to say that the “outcome in *Brown v. Board of Education* was not constrained by precedent”¹⁵³ when it is quite plain that the framers excluded segregation from the scope of the amendment.¹⁵⁴ It is a grave defect of analysis that Simon does not consider the historical materials on such issues.

Pointing to the distinction between framers and ratifiers, Simon attributes to originalists the view that “the ratifiers had exactly the same understandings of *all* constitutional provisions as the drafters had.”¹⁵⁵ For my part, I have never sought to

143. *Id.* at 2766.

144. *Id.* at 704.

145. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION 39th Cong., 2d Sess., S. Rep. No. 112 (1866) (reprinted, THE RECONSTRUCTION AMENDMENTS DEBATES 94 (A. Avins ed. 1966)).

146. See R. BERGER, *supra* note 6, at 56, 59–60, 79.

147. *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974).

148. Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 Nw. U.L. REV. 311, 321–23 (1979).

149. Bork, *supra* note 17, at 18.

150. Simon, *supra* note 18, at 628.

151. 337 U.S. 533 (1964).

152. Simon, *supra* note 18, at 629.

153. *Id.*

154. See *supra* note 6.

155. Simon, *supra* note 18, at 637 (emphasis added).

theorize about "all" constitutional provisions, but, true to the common law tradition, have been content to deal with the particular case. On one particular issue that I studied in depth—the provision for judicial review—framers and ratifiers had the same understanding: the courts were to declare legislation in excess of delegated power unconstitutional.¹⁵⁶ But, how, Simon asks, "did the ratifiers come to learn the meaning of each provision, especially since the proceedings of the original Constitutional Convention were secret?"¹⁵⁷ He could have learned from the records of the Ratification Conventions that in none was "each provision" ever discussed; some provisions were not discussed presumably either because they were unobjectionable or because their meaning was self-evident. Many were explained by delegates who themselves had been framers.¹⁵⁸ Doubters like Simon would do well to bear in mind that the very power of judicial review, not mentioned in the Constitution, rests on expressions in the several Conventions. If that intention is consulted for the purpose of establishing the *legitimacy* of judicial review, then it is arbitrary to exclude that intention when ascertaining its *scope*.

How stands it with Simon's distinction between framers and ratifiers in the frame of the 1866 "suffrage" facts? To begin with the popular understanding, the Report of the Joint Committee "was printed and distributed by the thousands" and served the Republican campaign for ratification of the fourteenth amendment.¹⁵⁹ A Reconstruction historian, Phillip Paludan, recounts that the amendment, "was presented to the people as leaving control of suffrage in state Hands."¹⁶⁰ It could hardly be otherwise. The "off-year elections of 1867," during which ratification of the amendment was debated, Morton Keller noted, "made clear the popular hostility to black suffrage in the North."¹⁶¹ William Gillette wrote that "most congressmen apparently did not intend to risk drowning by swimming against the treacherous current of racial prejudice and opposition to Negro suffrage. . . . [W]hite Americans resented and resisted" it, and "Negro voting in the North . . . was out of the question."¹⁶² As Gillette wrote about ratification of the fifteenth amendment, "state legislatures who outraged this consensus would commit political suicide."¹⁶³ Against this consensus it would be wildly unreasonable to assume that on the suffrage issue ratifiers differed from framers. The rational inference, rather, is that both spoke with one voice. Here then is a case demonstrating what Simon finds implicit in originalist claims: (1) there existed a collective state of mind, and (2) this state of mind can be

156. R. BERGER, *supra* note 63, at 47–153.

157. Simon, *supra* note 18, at 638.

158. New York, Lansing and Hamilton, 2 J. ELLIOT, *supra* note 19, at 272, 273; Virginia, Patrick Henry, William Grayson, James Monroe, Edmund Randolph, George Mason, 3 *id.* at 22, 292, 333, 366, 368, 369, 477, 522, 604; North Carolina, Richard Spaight, William Davie, 4 *id.* at 27, 31, 42, 100, 103, 139, 144; South Carolina, Charles Pinckney, Pierce Butler, Gen. C.C. Pinckney, *id.* at 255–57, 260, 263, 264–65.

For example, Monroe called upon Madison, "who had been in the federal Convention, . . . [to] give information respecting the clause concerning elections." 3 *id.* at 366. Randolph observed that *ex post facto* laws "relate solely to criminal cases; . . . [and] it was so interpreted in [the] Convention. *Id.* at 477.

159. Avins, *supra* note 145, at vi.

160. P. PALUDAN, *A COVENANT WITH DEATH* 52 (1975).

161. M. KELLER, *AFFAIRS OF STATE* 81 (1977).

162. W. GILLETTE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* 25, 27, 32 (1965).

163. *Id.* at 80, 88, 146.

ascertained by historical research.¹⁶⁴ I do not suggest that such illumination is available for every issue, but I maintain that when the evidence is *unmistakable*, activists fail in their scholarly duty to take it into account.

Bare assertion is endemic among activists. Thus my study of the fourteenth amendment is dismissed as “narrow” by William Van Alstyne,¹⁶⁵ and as an “extremely confined and narrow use of history.”¹⁶⁶ Alongside the exclusion of suffrage from the fourteenth amendment, I had demonstrated that the amendment was in fact narrow in scope, limited only to the 1866 Civil Rights Act prohibition of discrimination respecting the rights to contract, to own property, and to have access to the courts. Speaking of that Act, Justice Stewart stated in *Georgia v. Rachel*:¹⁶⁷

The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights. . . . [T]he Senate Bill did contain a general provision forbidding ‘discrimination in civil rights or immunities,’ preceding the specific enumeration of rights. . . . Objections were raised in the legislative debates to the breadth of the rights of racial equality that might be encompassed by a prohibition so general. . . . [A]n amendment was accepted [in the House] striking the phrase from the bill.¹⁶⁸

The chairman of the House Judiciary Committee, James Wilson, explained that the deletion was intended to preclude “a latitudinarian construction not intended,” a construction going “beyond the specific rights named in the section.”¹⁶⁹ It defies common sense to impute to the self-same framers a design to accomplish by the amendment, which was proceeding on a parallel track, what they had rejected in the Act.

But there is no need to speculate. A main purpose of the fourteenth amendment was to protect the Act from repeal by later Congresses by embodying it in the Constitution. Charles Fairman observed that “[o]ver and over again in this debate, the correspondence between Section [One] of the Amendment and the Civil Rights Bill is noted. The provisions of the one are treated as though they were essentially identical with those of the other.”¹⁷⁰ Henry Flack, a devotee of a broad construction of the amendment, wrote, “nearly all said it was but an incorporation of the Civil Rights Bill. . . . [T]here was no controversy . . . as to its meaning.”¹⁷¹ In a decision contemporary with adoption of the amendment, Justice Bradley declared that “the civil rights bill was enacted at the same session, and but shortly after the presentation of the fourteenth amendment; . . . [it] was *in pari materia*; . . . the first section of the bill covers the same ground as the fourteenth amendment.”¹⁷²

164. Simon, *supra* note 18, at 636.

165. Van Alstyne, *Interpreting this Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209, 234 n.65 (1983).

166. Richards, *supra* note 79, at 512; *see also infra* text accompanying note 319.

167. 384 U.S. 780 (1966).

168. *Id.* at 791–92. For confirmatory citations *see* R. BERGER, *supra* note 6, at 27 n.26.

169. CONG. GLOBE 39th Cong., 1st Sess. 1366–67 (1866).

170. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 44 (1949).

171. H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 81 (1908).

172. *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. CAS. 649, 655 (C.C.D. La. 1870). Oblivious to such facts, Simon postulates “if prevention of unequal treatment in

Even so, Simon demands "an account of why the framers' wishes are or ought to be authoritative"; "[w]hy should anyone then or now care what the Constitution says of what they wanted?"¹⁷³ The answer is supplied in part by Simon himself: "[I]f relevant members of society take an internal attitude toward a particular interpretative methodology—that is, if they believe it is *the* authoritative method,"¹⁷⁴ then that is the governing rule. But Simon later maintains that there "is no widespread consensus or internal attitude about the proper method of constitutional interpretation"; the original intention "has had virtually no currency at all in the Supreme Court during most of this century."¹⁷⁵ To him, it "seems entirely implausible to think that there is any consensus among the American people that ties their regard for the Constitution to a set of meanings that existed in 1789."¹⁷⁶ Simon asks too much; to the people, the niceties of interpretation are as foreign as Sanskrit. But they are the stock in trade of the interpretative legal community, Simon's "relevant members of society." But, asserts Simon, the "notion that the Constitution means what it meant in 1789" is not "taken seriously . . . by the vast majority of the legally trained population."¹⁷⁷ He neglects to explain why lawyers, accustomed to seek the intent of testators, contracting parties, and legislators, suddenly abandon that principle when they analyze the Constitution. The fact is that constitutional issues seldom, if ever, cross the desk of the vast majority of practitioners, and as Solicitor General Robert H. Jackson observed, "[t]his political role of the Court has been obscure to laymen—even to most lawyers."¹⁷⁸ So long as the Court professes to speak with the voice of the Constitution, lawyers may take them at their word.

Respect for the intention of the draftsmen goes back to medieval times. Noting the bloodletting case in Bologna, the Supreme Court said, "The books are full of authorities to the effect that the intention of the lawmaking power will prevail. . . . 'The intention of the lawmaker is the law.'"¹⁷⁹ That was the established rule at the framing of the Constitution. In a treatise known to the colonists, Thomas Rutherford stated: "The end which interpretation aims at, is to find out what was the intention of the writer, to clear up the meaning of his words"¹⁸⁰ On the heels of the

fundamental rights was the goal of the framers of the fourteenth amendment," and suggests that we do not "know enough about the framers' beliefs and states of mind" to "govern means/goals or analytical interpretation today." Simon, *supra* note 18, at 644. Their goal was not to afford equal protection for all "fundamental" rights but only for *some*, as the repeated rejection of proposals to ban all discrimination further evidences. R. BERGER, *supra* note 6, at 163–65.

173. Simon, *supra* note 18, at 646.

174. *Id.* at 613 (emphasis in original).

175. *Id.*

176. *Id.* A recent commentator concludes that after "the revolution of 1800" the "rhetoric" of the Constitution's "original 'intent' acquired an aura of age and self-evident truth all its own," and that "by the outbreak of the Civil War, intentionalism in the modern sense reigned supreme in the rhetoric of constitutional interpretation." Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 934–35, 947 (1985). For the Court's uninterrupted recourse to that intent, see *infra* text accompanying note 185.

177. Simon, *supra* note 18, at 613. For a withering indictment of activist theorizing ascendant in academe, see Bork, *Foreword* to G. McDowell, *THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY* (1985).

178. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* at xi (1941).

179. *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903). Marshall considered that the common law contained "the most complete evidence that the *intention* is the most sacred rule of interpretation." JOHN MARSHALL'S DEFENSE OF *McCulloch v. MARYLAND* 167 (G. Gunther ed. 1969) (emphasis in original). Among Blackstone's rules of construction is "where the intention is clear, too minute a stress be not laid on the strict and precise signification of words." 2 W. BLACKSTONE 397.

180. 2 T. RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 309 (1754–1756). Those Institutes, Justice Story wrote, "contain

Convention, Justice Wilson said: "The first and governing maxim in the interpretation of a statute is to discover the meaning of those who made it."¹⁸¹ Justice Story reiterated: "The first and fundamental rule in the interpretation of *all* instruments is, to construe them according to the sense of the terms and intention of the parties."¹⁸² Very early the Court declared that construction "must necessarily depend on the words of the constitution; the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states . . . to which this Court has always resorted in construing the Constitution."¹⁸³ "Of course," Justice Holmes observed, "the purpose of written instruments is to express some intention or state of mind of those who write them, and it is desirable to make that purpose effectual."¹⁸⁴ The Court "has insisted," Jacobus ten Broek wrote, "with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those persons who formulated the instrument or of the people who adopted it."¹⁸⁵

Respect for such rules does not represent blind adherence to a formula. Hamilton stressed that "to avoid arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every case that comes before them."¹⁸⁶ Justice Story asked, "are the rules of the common law to furnish the proper guide, or is every court and department to give [a statute] any interpretation according to its own arbitrary will?"¹⁸⁷ The Founders preferred rules, in the words of Chancellor Kent, to "a dangerous discretion . . . to roam at large in the trackless field of [the judge's] own imagination."¹⁸⁸ Such rules are the distillation of centuries of experience, of accumulated wisdom.¹⁸⁹ Owen Fiss, an activist, points to the "disciplining rules" of our "professional grammar" and other constraints embedded in the interpretative community as anchors for the Constitution.¹⁹⁰ But Simon protests that Fiss "gives no examples of disciplining rules," and I am very skeptical that any such rule could be "articulated insofar as we are interested in what the Court does when it 'interprets'

a very lucid exposition of the rules of interpretation." 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 403 n.1 (5th ed., 1905). See also Berger, *supra* note 14.

181. 1 J. WILSON, *supra* note 121, at 75; see also *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 290 (1827).

182. 1 J. STORY, *supra* note 180, at § 400.

183. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838); see also *Whitman v. Oxford Nat'l Bank*, 176 U.S. 559, 563 (1900); cf. *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959) (per Judge Hand).

184. O. HOLMES, COLLECTED LEGAL PAPERS 206 (1920).

185. ten Broek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CALIF. L. REV. 399 (1938).

186. THE FEDERALIST No. 78, at 504, 510 (A. Hamilton) (Mod. Lib. ed. 1937).

187. 1 J. STORY, *supra* note 180, at § 166 n.2. Consider the cognate rule for terms which had a common law meaning. Marshall applied the rule in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824), stating that if a word was understood in a certain sense "when the constitution was framed . . . the convention must have used [it] in that sense." For additional citations to this rule, see R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE, 62-64 (1982). Why should words which are defined by external common law practice weigh more heavily than the clear explanation by the draftsmen themselves.

188. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 373 (9th ed. 1858).

189. Jean Monnet said of "rules of action" for the Common Market that they "substitute an enduring collective memory for fleeting and fragmented . . . experience." J. MONNET, MEMOIRS 457 (1982).

190. FISS, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 745 (1982). Lawyers are accustomed to complying with rules of evidence and rules of construction.

the Constitution.”¹⁹¹ If this is an oblique reference to the Court’s wayward use of rules, to its formulation of rules in pairs which enable it to go either way, I would not disagree. But that many rules nonetheless have existed and been honored for centuries can hardly be denied, as is exemplified by the original intention rule, a constant in judicial citations. That rule is the more important if, as Simon relates, the Constitution contains a “galaxy of infinite meaning[s] . . . an enormous range of language-meaning[s].”¹⁹²

The Founders considered that they had avoided the vague for the specific;¹⁹³ the last thing they had in mind was to set judges afloat on a sea of unlimited discretion.¹⁹⁴ Their *bete noir* was illimitable power, fueled by the states’ jealous insistence on safeguarding their jurisdiction of internal affairs—hence their insistence on delegating limited power,¹⁹⁵ as the tenth amendment confirms. Preservation of state sovereignty was also the concern of the fourteenth amendment’s framers. Roscoe Conkling, a member of the Joint Committee on Reconstruction, stated: “[T]he proposition to prohibit States from denying civil or political rights to any class of persons, encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty. . . . It takes away a right which has always been supposed to inhere in the States and transfers it to the General Government.”¹⁹⁶ Any interpretive approach which would endow judges with a power to invade state sovereignty furnishes an additional reason for rejection. The modern repudiation of the original intention does not arise from activist zeal to tap a purer spring of scholarship, but rather from awareness that both the desegregation and one-man-one-vote decisions are contrary to the original intention. Consequently, that intention must at all costs be discredited.

Simon was careful to hedge, to urge that the original intention “has had virtually no currency at all in the Supreme Court during most of *this* century” in constitutional cases.¹⁹⁷ Let that be assumed and it does not follow that the rule was overruled *sub silentio*. Given the long historical practice, the activists have the burden of justifying a departure from the original intention. In a similar context, the Court stated that “such a basic change in one of the fundamentals of *constitutional construction* should hardly be left to conjecture.”¹⁹⁸ The original intention has continued to prevail in the cognate field of statutory construction, from *Hawaii v. Mankichi*¹⁹⁹ in 1903 to *Learned Hand* in 1959: if the legislative purpose is “manifest” it “override[s] even

191. Simon, *supra* note 18, at 623.

192. *Id.* at 604, 630, 633.

193. See S. ADAMS and R. King, *supra* note 32.

194. See *supra* note 128. See also Jones, *The Common Law in the United States: English Themes and American Variations*, in *POLITICAL SEPARATION AND LEGAL CONTINUITY* 103 (H. Jones ed. 1976).

195. R. BERGER, *supra* note 63, at 260–63.

196. CONG. GLOBE 39th Cong., 1st Sess. 358 (1866); see also Delano, *Globe App.* 158; Eldridge, *Globe* 1154. “One reason the Reconstruction of the South loomed so high to northerners,” Harold Hyman concluded, “was less that blacks were involved than that every one understood the preeminence of states . . . in affecting all their citizens’ lives.” H. HYMAN, *A MORE PERFECT UNION* 426 (1973).

197. Simon, *supra* note 18, at 613 (emphasis added). See also *supra* note 176 and accompanying text.

198. *Brady v. Roosevelt Steamship Co.*, 317 U.S. 575, 580–81 (1943).

199. 190 U.S. 197 (1903).

the explicit words used.”²⁰⁰ In “a blinding flash of insight,” Judge John G. Gibbons of the Third Circuit Court of Appeals,²⁰¹ rejected the application “to constitutional history of the inadequate tools of statutory interpretation.”²⁰² Are judges to enjoy greater freedom in ignoring the will of the framers than they enjoy in ignoring the statutes written by mere legislators? Why indeed should we be ready to effectuate the intention of a testator and deny effect to the unmistakable intention of the framers? Gibbons overlooked that the common law proceeds by analogy, from wills to statutes, from statutes to constitutions. Since the common law knew no written constitutions, judges had to turn, as Marshall did, to rules pertaining to “other legal documents.”²⁰³ Corwin observed that our early judges adapted “the numerous [common law] rules for construction of written instruments . . . to the business of constitutional construction.”²⁰⁴ Julius Goebel likewise noted that the Founders were accustomed to resorting “to the accepted rules of statutory interpretation to settle the intent and meaning of constitutional provisions.”²⁰⁵ The Court itself stated in the recent legislative chaplain case: “Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment.”²⁰⁶

Then too, it is a mistake to regard the issue of original intention solely in terms of whether a rule of interpretation need be binding. Adherence to the original intention is heavily reinforced by the fact that the explanations of the text to the Ratifiers were designed to garner votes for adoption of the Constitution (which trembled in the balance), and the Ratifiers acted on the basis of those *representations*. To repudiate them, Justice Story wrote in similar case, would constitute a fraud upon the American people.²⁰⁷ He merely reflected the doctrine of estoppel: one who induces another to act on the basis of representations is estopped to deny them.

200. *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959). Simon's suggestion that if “its author-intended meaning and language-meaning are inconsistent, it has no meaning,” Simon, *supra* note 18, at 635, runs counter to this long line of cases holding that in such case the intended meaning shall prevail. Activist philosophizing all too often takes no account of established legal doctrines.

201. Gibbons charged me with discerning the original intention “with blinding clarity in the stygian darkness of the records of the 39th Congress.” Gibbons, Book Review, 31 *RUTGERS L. REV.* 839, 840 (1978). This about the “irrefutable” exclusion of suffrage from the fourteenth amendment!

202. *Id.* at 847.

203. Tushnet, *supra* note 6, at 781, 786.

204. Corwin, *The ‘Higher Law’ Background of American Constitutional Law*, 42 *HARV. L. REV.* 365, 371 (1938).

205. 1 J. GOEBEL, *HISTORY OF THE UNITED STATES* 128 (1970). See also J. STORY, *supra* note 180.

206. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). Michael Moore notes “the long-standing judicial tendency to pay at least lip service to the idea that interpretation is aimed at uncovering legislative intent.” Moore, *supra* note 69, at 352. He observes that legislative intent “would indeed constrain judicial power,” *id.* at 353, but it requires a “justification.” It is for the activists, rather, to justify an unconstrained judiciary, a concept so remote from the Framers’ contemplation. See also Kay, *supra* note 47.

207. “If the Constitution was ratified under the belief, sedulously propagated, . . . that such protection was afforded, would it not now be a fraud upon the whole people to give a different construction?” 2 J. STORY, *supra* note 180, § 1084. In a speech in the Senate on January 13, 1802, Rutledge, after noting that Jefferson adhered “to the plain understanding of [the] framers,” went on to explain that the three authors of the Federalist,

who had the most agency in framing this Constitution, finding that objections had been raised against its adoption, and that much of the hostility produced against it had resulted from a misunderstanding of some of its provisions, united in the patriotic work of explaining the true meaning of its framers.

4 J. ELLIOT, *supra* note 125 at 446.

In truth, the original intention doctrine is faithful to the essence of communication: it is for the speaker to explain what his words mean. The listener or reader can dispute the proposition, but he may not insist in the face of the speaker's own explanation that he meant exactly the opposite. When the speaker explains that by "potato" he really meant "potato," the listener may not insist that he really meant "tomato." James Nickel agrees that "in standard communication [of a message] the receiver's will is subordinate to the sender's, . . . [for] we cannot strip the sender of the ability to select the meaning of a message and still have communication."²⁰⁸ But he distinguishes "standard communication" from constitutional interpretations for a number of reasons, and I shall comment on two of them. First, he discusses "[t]he presence of judges as authoritative interpreters with the ongoing power to reshape incrementally the scope of constitutional values and clauses."²⁰⁹ Nickel assumes the answer to the central question: where were judges empowered to override the framers' intention? In fact, no such authority is conferred by the Constitution, and no activist has ever cited to the grant. On the contrary, judges themselves have recognized for 175 years that they are duty-bound to effectuate the original intention. Second, he discusses "[t]he sensitivity to consequences of constitutional interpretation that often have major social impacts, and thus are expected to be wise and not grossly unfair in contemporary terms."²¹⁰ That is what *activists* expect—that judges shall determine what is "grossly unfair"; it was not the expectation of the framers. James Wilson said that "[I]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect."²¹¹ So too, Chief Justice Marshall cautioned: "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional."²¹²

"There is no basis," Simon asserts, "to presume that the ratifiers were aware that the general language of the Constitution carried such specific ['quite limited concrete'] meanings."²¹³ Confining myself to the judicial transformation of the fourteenth amendment, it can hardly be doubted that they "were aware" that "equal protection" had a "quite limited meaning," excluding, for example, suffrage. Presumably "equal protection" is one of the terms which, according to Simon, have an "infinite galaxy of meanings." A word which can mean anything means nothing. "Equal protection" is so broad, Wallace Mendelson observed, as to be almost meaningless.²¹⁴ Ely regards the words as "inscrutable"²¹⁵ while J.R. Pole wrote that the "pursuit of equality was the pursuit of an illusion."²¹⁶ It is therefore to be expected, as Simon remarks, that "[d]ifferent Justices . . . with very different beliefs

208. Nickel, *Uneasiness About Easy Cases*, 58 S. CAL. L. REV. 477, 482 (1985).

209. *Id.* at 484.

210. *Id.* at 485.

211. 2 M. FARRAND, *supra* note 24, at 73.

212. JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND* 190-91 (G. Gunther ed. 1969).

213. Simon, *supra* note 18, at 637-38.

214. Mendelson, Book Review, 6 HASTINGS CON. L.Q. 437, 451 (1979).

215. J. ELY, *DEMOCRACY AND DISTRUST* 98 (1980).

216. Kurland, Book Review, 88 YALE L.J. 898, 901 (1979).

about justice" are likely to have "widely different" opinions "regarding what counts as a 'denial of the equal protection of the laws.'"²¹⁷

The original purpose to exclude suffrage and segregation, to confine the fourteenth amendment to a narrow "specific" compass, though, would preclude precisely the exercise of such untrammelled discretion. The framers themselves contemplated that future interpreters would look to the original intention. Senator Charles Sumner, an unremitting proponent of the broadest spectrum of rights for blacks, stated in the 39th Congress that if the meaning of the Constitution "in any place is open to doubt, or if words are used which seem to have no fixed signification [e.g., "equal protection"], we cannot err if we turn to the framers; and their authority increases in proportion to the evidence they have left on the question."²¹⁸ This was the view of the Reconstruction Congress. Rejecting an appeal by women for a statutory grant of suffrage under the fourteenth amendment, a unanimous Senate Judiciary Report dated January 1872, signed by Senators who had voted for the fourteenth amendment, stated that "[a] construction which would give the phrase . . . a meaning differ[ent] from the sense in which it was understood and employed by the people when they adopted the Constitution, would be as unconstitutional as a departure from the plain and express language of the Constitution."²¹⁹ In the reams of activist writing on "equal protection," there is no allusion to these historical facts. Activists are more at home with speculation, with theorizing divorced from grubby facts.²²⁰ It is not enlightening to be told in effect that equal means equal,²²¹ particularly because the framers repeatedly rejected proposals to ban *all* discrimination.²²² That alone suffices to refute Simon's speculation that "[p]erhaps, for example, the correct description of the intention behind the fourteenth amendment is that the framers wanted the former slaves not to be denied equal treatment in matters that concerned fundamental rights."²²³ Thereby he translates "some" fundamental rights into "[all] fundamental rights."²²⁴ So too, he asks, if the framers "did not believe segregation was 'unequal' but we do today, is it 'more faithful' to their meaning to prohibit or permit it?"²²⁵ It would be "faithless" to their meaning

217. Simon, *supra* note 18, at 624.

218. CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).

219. THE RECONSTRUCTION AMENDMENTS DEBATES 571 (A. Avins ed. 1967). See *supra* note 176. So far as the fourteenth amendment is concerned, these utterances refute Ronald Dworkin's argument "that the Constitution drafters intend that their beliefs and intentions are not to be taken as authoritative by the courts." Moore, *supra* note 69, at 323 n.84. As regards the 1787 Framers, Madison, chief architect of the Constitution, stated that if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security . . . for a faithful exercise of its powers." 9 J. MADISON, WRITINGS 191 (G. Hunt ed. 1910). It was in that sense that Jefferson conducted his presidency. 4 J. ELLIOT, *supra* note 125, at 446. And both Washington and Madison appealed from time to time to the sense of the Founders. For citations see Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751, 771 n.135 (1984).

220. See *infra* text accompanying notes 232-35.

221. Simon criticizes Dworkin, *supra* note 18, at 641: "On this view, . . . the abstract intention of the authors of the equal protection clause was to prevent states from denying persons the equal protection of the laws."

222. J. BERGER, *supra* note 6, at 163-64.

223. Simon, *supra* note 18, at 639.

224. See *supra* text accompanying notes 168, 172.

225. Simon, *supra* note 18, at 644.

to read "unequal" as "equal," as embracing what they unmistakably meant to exclude.

Unable to explain away the facts, Ronald Dworkin, the high priest of activism, has conjured up an "abstract intention" of the framers that soars above their specific intent, the evidence for which he finds in the language of the Constitution.²²⁶ His disciple, David Richards, describes the process whereby one distills that much larger "abstract intention" as the "Herculean excavation of background rights." To illustrate, he cites Brandeis' excavation of the right of privacy, as underlying various extant rights of property, tort, copyright, and unfair competition, thus resonating an independent right of tort and, eventually, of constitutional law.²²⁷ To deduce a private law principle of privacy from tort and property law is one thing; to balloon it into a constitutional "right" is something else again. That is no "excavation" in the Constitution or its history, but rather a judicial construct out of the blue. "Privacy" as an all-encompassing constitutional right was "not a part of the legal tradition inherited from England by the colonies."²²⁸ Nor did it faintly "resonate" in the several constitutional conventions. Philip Kurland rightly stated that the "right of privacy" is not a part of the Constitution, but evidences "deconstruction by label."²²⁹ Dworkin's "abstract intention" strikes Simon, "as it has others, as entirely unpersuasive," defining "the framers' state of mind at such a high level of abstraction that any such 'linkage' is to framers who have been entirely disembodied, abstracted out of time and history."²³⁰ As Jacques Barzun has observed, "abstraction forms a ladder which takes the climber into the clouds, where diagnostic differences disappear," adding that "at a high enough rung in the ladder of abstraction disparate things become the same: a song and spinning top are, after all, but two ways of setting air waves in motion."²³¹

Dworkin illustrates the current activist tendency to escape to the clouds from the earthy facts. Let one example suffice, that of his imaginary soliloquy of a fourteenth amendment framer: "Nor do I, as it happens, have any particular preferences myself, either way, about segregated schools. I haven't thought much about that either."²³² If he hadn't, it was because desegregation was unthinkable in

226. *Id.* at 641. "The results Dworkin obtains, or rather forces," comments Judge Robert Bork, "resembled nothing so much as a political wish list. We are all entitled to our own wish lists but not to demand that judges make our wishes come true." Bork, *supra* note 177, at ix-x. Thomas Pangle considers that

the account of human rights Dworkin offers turns out to be little more than a convoluted ideology supporting precisely those reactions to current policy issues that a conventional liberal academician is likely to have.

* * * *

One might expect, however, that he would not so cavalierly dress up his opinions as "natural rights" or call the culture-bound process by which he arrives at them "philosophy." Pangle, *Rediscovering Rights*, Pub. Interest, Winter 1978 at 157, 159-60.

227. Richards, *supra* note 79, at 502.

228. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 266-67 (1983).

229. Kurland, *Some Comments on the Divine Right of King's Courts "To Say What the Law Is"*, 23 ARIZ. L. REV. 581, 592 (1981).

230. Simon, *supra* note 18, at 641, 642.

231. J. BARZUN, *A STROLL WITH WILLIAM JAMES* 59, 65 (1983). He comments: "Why . . . philosophers should have vied with each other in scorn of the knowledge of the particulars and in adoration of the general is hard to understand . . . [for] the things of worth are concrete and singular." *Id.* at 58.

232. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 487 (1981).

an atmosphere rampant with racism.²³³ James Wilson, chairman of the House Judiciary Committee, felt constrained to assure the framers that the Civil Rights Act of 1866 did not mean that all children "shall attend the same schools,"²³⁴ an attitude that persisted into the enactment of the Civil Rights Act of 1875, from which segregation in schools was excluded.²³⁵ Such are the fantasies of one indifferent to historical fact.

V. THREE THEORIES OF CONSTITUTIONAL INTERPRETATION

A. Michael Perry's Theory

1. The "Writtenness" of the Constitution

With his usual candor, Perry has described the "importance attached . . . to the 'writtenness' of the Constitution" as one of the "two persistent features of judicial practice in modern individual rights cases," noting that "the text is accorded authoritative status" even by "an 'activist' Supreme Court."²³⁶ "The importance of 'writtenness' should not be underestimated," he comments, for "[a]s Paul Ricoeur has emphasized, 'it is with writing that the text acquires its semantic autonomy in relation to the speaker, the original audience and the discursive situation common to the interlocutor.'"²³⁷ A lawyer may prefer Chief Justice Marshall's more intelligible explanation:

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?²³⁸

If the Constitution is alterable at the pleasure of the legislature (or the courts), he continued, "then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable." This would reduce "to nothing what we have deemed the greatest improvement on political institutions—a written constitution," a construction that must be rejected in America where "written constitutions have been viewed with so much reverence."²³⁹

The Founders' resort to a written constitution was derived from the centuries-old English insistence on written guarantees of their rights, as exemplified by the Barons'

233. Racism "ran deep in the North." D. DONALD, *CHARLES SUMNER AND THE RIGHTS OF MAN* 202, 252 (1970). An Indiana Radical deplored the "proverbial hatred" of Negroes. *CONG. GLOBE*, 39th Cong. 1st Sess. 257 (1866). See R. BERGER, *supra* note 6, at 13.

234. *CONG. GLOBE*, 39th Cong., 1st Sess. 1117 (1866).

235. Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 *Nw. U.L. REV.* 311, 329 (1979).

236. Perry, *supra* note 9, at 557. Even Chief Justice Warren professed to share these views: "We cannot push back the limits of the Constitution[;] . . . [w]e must apply those limits as the Constitution prescribes them." *Trop v. Dulles*, 356 U.S. 86, 104 (1958).

237. Perry, *supra* note 9, at 566.

238. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

239. *Id.* at 177, 178. McArthur writes: "Noninterpretivists are eager to discard written systems of law, including that based on the Constitution, because written law is the barrier between law and politics." McArthur, *supra* note 9, at 313.

wresting of the Magna Carta from King John. A brilliant French observer, Hippolyte Taine, stated that "[i]t was no supposition or philosophy which founded them [rights], but an act and deed, Magna Carta, the Petition of Rights, the Habeas Corpus Act."²⁴⁰ Paraphrasing Edmund Burke, he added, "our rights do not float in the air, in the imagination of philosophers, [but rather] they are put down in Magna Carta."²⁴¹ If the Constitution embodied a "tradition," it was this insistence on reducing guarantees to a writing. In Jefferson's words, the writing was employed "to bind down those we are obliged to trust with power," to bind them "down from mischief by the chains of the Constitution."²⁴² Throughout Perry would loosen the grip of those bonds: "the text is an occasion of and for *remembering* . . . [t]he *founding, constitutive* aspirations of the religious or political tradition of which we . . . are the present bearers." Likewise, it is "an occasion . . . for *responding*" to those aspirations, "interpretation" consists in "remembering those founding, constitutive aspirations and responding to them."²⁴³ Now the central meaning of "respond" is to reply; if Perry means more than this—that the respondent is bound by those "constitutive aspirations"—then his argument is gratuitous and obfuscatory.

Perry tells us that communities "share visions as to both whether something is a text and what sort of text it is."²⁴⁴ A text is defined as the "wording of anything written or printed . . . [t]he very words and sentences as originally written."²⁴⁵ Can it be doubted that the American people consider that the Constitution "is a text" and was "originally written" by the Framers? To label it a mere "shared vision" is to blur reality. "What is the constitutional text?" asks Perry. "Ought we to understand or conceive of the 'text' as (a) the verbal or linguistic embodiment of the political morality constitutionalized by the ratifiers; (b) particular marks on a page; (c) a symbol of some sort?"²⁴⁶ "Particular marks on a page" is a no more fruitful attempt to peer behind the beginning than an inquiry into what moved the Prime Mover.²⁴⁷ To reduce the text to "particular marks" is to suggest that it could have been written by monkeys, whereas mankind for millenia have employed words to communicate their thoughts to others. It should suffice to begin there.

So too, the conception of "the constitutional text as the verbal or linguistic embodiment of the political morality constitutionalized by the ratifiers" beclouds the Founders' unmistakable intention to limit the power that they were delegating. Although Perry defends modern judicial doctrine "as a matter of political morality," he candidly asks how a court is to deal with questions of political morality and comments that "[p]olitical-moral philosophy, after all, is in a state of serious

240. 2 H. TAINE, *supra* note 79, at 121, 143.

241. *Id.*

242. 4 J. ELLIOT, *supra* note 125, at 543.

243. Perry, *supra* note 9, at 563 (emphasis in original).

244. *Id.* at 565.

245. OXFORD UNIVERSAL DICTIONARY (3d ed. 1964).

246. Perry, *supra* note 9, at 552.

247. "[W]e vainly try to rise, and that by conjecture, to an initial state . . . we are forced to accept it as a pure postulate." 4 H. TAINE, *supra* note 79, at 421.

disarray.”²⁴⁸ This underlines the virtue of preferring the concrete and particular to vague generalizations. Similarly, to label the constitutional text as “*the* principal symbol of, the aspirations of the tradition”²⁴⁹ is to water down the concrete expression of those aspirations. A “symbol” is “[s]omething that stands for, represents, or denotes something else (not by exact resemblance, but by vague suggestion, or by some accidental or conventional relation).”²⁵⁰ Why should we prefer a “vague suggestion” or “accidental relation” to the instrument itself? Perry recognizes that not every constitutional provision “symbolizes an aspiration of the political tradition. . . . Some parts of the Constitution” merely “settle housekeeping matters.”²⁵¹ In truth, the Constitution in great part sets up a structure of government, limiting and diffusing delegated power, having little or no roots in the “political morality” of the victorious colonists, whereas Perry is largely concerned with expanding the spectrum of individual human rights.²⁵² “[T]he actual problems of government the Americans faced were now so urgent, so new,”²⁵³ that in the words of Madison, they “reared the fabrics of government which have no model on the fact of the globe.”²⁵⁴ What they shared in common was a dedication to self-government, preferably on a local rather than national scale, a deep distrust of the greedy expansiveness of power, and a determination to limit that power, all of which are not listed in Perry’s “shared aspirations.” The institutions they invented to meet that demand reached beyond the familiar and accepted, for example into judicial review itself. It must be remembered that the framers were only commissioned to remedy the defects of the Articles of Confederation, not to draft a new Constitution, which they proceeded to do behind closed doors. Before we regard the document that emerged as the crystallization of the inchoate “aspirations” of the people, we must recall that adoption of the Constitution was bitterly contested and was in truth a very close call. It is idle to speak of shared moral aspirations where the people are deeply divided. A “radical division of opinion,” said Thomas Nagel, indicates that there is a “case of basic moral uncertainty.”²⁵⁵

Let us next examine Perry’s “key notions . . . [of] community, tradition, and sacred text.” Perry employs the “sacred text” notion because of “illuminating similarities between the constitutional text and religious texts,”²⁵⁶ and he uses it to erect his theory of broadened judicial review. Roughly speaking, Perry defines a

248. Perry, *supra* note 9, at 578, 593.

249. *Id.* at 564 (emphasis in original).

250. OXFORD UNIVERSAL DICTIONARY (3d ed., 1964).

251. Perry, *supra* note 9, at 570–71.

252. M. PERRY, *supra* note 89, at 146–62. Earl Maltz observed:

Most of the Constitution is not directly concerned with the establishment of “human rights” at all; rather, much of the document is devoted to the description of the structure of government and to the definition of the powers of various branches. These structural provisions are concerned with the basic issues—the distribution of authority between the state and federal governments, and the allocation of federal powers between the various branches of the central government.

Maltz, *supra* note 9, at 626–27. These are questions of power rather than political morality.

253. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 300 (1967).

254. *THE FEDERALIST* No. 14, at 85 (J. Madison) (Mod. Lib. ed. 1937). “The Convention . . . smuggled a new nation upon the continent rather than bringing it forth by intellectual impregnation.” G. WILLS, *supra* note 79, at xvii.

255. Nagel, *The Supreme Court and Political Philosophy*, 56 N.Y.U. L. REV. 519, 524 (1981).

256. Perry, *supra* note 9, at 558, 557.

"community" as a group that participates in a tradition, a "tradition" as a narrative-history "whose central motif is an aspiration to a particular form of life"; a "sacred text" as a symbol of "a mandate to conform to that form"; and the text-as-symbol as a presupposition of "a context of shared beliefs, in particular, shared aspirations."²⁵⁷ But he notices, for example, that among Catholics there is "a very deep and widespread dissensus,"²⁵⁸ and the same can be said of diverse Protestant sects, and of Jews and Moslems. The nation is even more deeply riven on issues of abortion, affirmative action, and school prayer.²⁵⁹ Surprisingly, Perry considers that "judicial justification of constitutional decisions, most evidently in cases like *Brown* and *Roe*, consists of reason-giving that presupposes a context of shared beliefs, in particular, shared aspirations."²⁶⁰ Attacks by abortionists on abortion clinics and the rising tide for amendment to overrule *Roe* refute the notion of "shared aspirations."²⁶¹ Nor could *Brown* have succeeded with the people in 1954, as activists have acknowledged.²⁶² The Court would not respond to Justice Jackson's plea in the *Brown* proceedings to tell the people that it was making new law for a new day²⁶³—the issue was far too touchy for candor. And today black commentators deplore the widening gap between the races.²⁶⁴ Without shared aspirations, Perry's rationale for *Brown* and *Roe* collapses. Then too, why should the "text-as-symbol" notion be more authoritative than the concrete expression of the mandate in the written instrument?

Writing in 1983, Perry properly dismissed the "romantic notion that 'tradition,' . . . can serve as a source of decisional norms" because "the so-called American tradition . . . is severely fragmented."²⁶⁵ Two years later, Perry is still questioning whether a homogenous tradition exists, asking, "is there an 'American political tradition,' a 'context of shared beliefs and aspirations' or is that the sheerest fantasy?"²⁶⁶ He does not pretend to answer that question, and in fact he confesses that much study is required before the companion "political morality" can serve.²⁶⁷

257. *Id.* at 558-92.

258. *Id.* at 596.

259. Sanford Levinson observes that "the 'people' do not appear to embrace the decisions made in their name." Levinson, *The Turn Towards Functionalism in Constitutional Theory*, 8 U. DAYTON L. REV. 567, 569 (1983). See *supra* notes 10, 110.

260. Perry, *supra* note 9, at 592.

261. "The controversy that surrounds many of the Court's human rights cases—the death penalty and abortion cases are good examples—shows that neither the public nor the courts share a consensus on what Perry views as moral issues." McArthur, *supra* note 9, at 291. As to the quality of the Court's "reason-giving," see Ely's mordant critique; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

262. Edmond Cahn wrote that "as a practical matter it would have been impossible to secure adoption of a constitutional amendment to abolish 'separate but equal.'" Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 156 (1955).

263. R. KLUGER, *SAMPLE JUSTICE* 681, 689 (1976).

264. See, e.g., Bell, *The Burden of Brown on Blacks: History-Based Observations on a Landmark Decision*, 7 N.C. CENT. L.J. 25, 26, 36 (1975) ("[T]oday, opposition to desegregation is, if anything, greater than it was in 1954."). Wilkins, *Racial Outlook: Lack of Change Disturbs Blacks*, N.Y. Times, March 3, 1978, § A, at 26 ("The attitude of whites towards blacks is basic in this country.").

265. M. PERRY, *supra* note 89, at 94, 93. We are entitled to ask Perry as he asked Ely: If there is no consensus, "by what right does the judiciary substitute its particular conception for the conception of the people's electorally accountable representatives?" *Id.* at 80.

266. Perry, *supra* note 9, at 592.

267. *Id.* at 593.

In light of his reliance on *Brown* and *Roe* as expressive of "shared aspirations," I consider his cogitations about the "American political tradition" to be the "sheerest fantasy." It is a paradox that in exalting tradition Perry is ready to jettison the longheld, unmistakable Anglo-American legal "tradition" that "lawmaking" is not for judges, that the intention of the draftsman is the law, in favor of the inchoate, "severely fragmented" moral-political tradition.

Nevertheless, Perry argues that "tradition and reason, rather than the ratifiers' normative judgments, should be authoritative for constitutional decision making," and he advocates "reason-giving that presupposes a context of shared beliefs, in particular, shared aspirations."²⁶⁸ But Perry is uneasy about "precisely [what] this 'reason giving'" is, and, as *Brown* and *Roe* show, with good reason.²⁶⁹ We may therefore put on hold his belief that this "shared vision as to the 'boundary' and 'nature' of a text constrains the interpretive activity;" that is to say, as "a symbol of the aspirations of the political tradition" which the constitutional text "constrains in the way and to the extent that aspirations of the tradition constrain."²⁷⁰ That, according to his own words, amounts to next to no constraint: "the text (as I conceive it) is not a significant constraint on the choices any majority of the Court is likely to want to make."²⁷¹ Thus, he opens the door to the "use of our tradition to revise, reform and re-present our tradition,"²⁷² a task he hands over to judges.

2. *The Argument from Democracy*

Perry examines "the two principal arguments that have been directed against [the activist judicial] role, . . . the argument from democracy and the argument from contract."²⁷³ In truth, the principal anti-activist argument is that the Constitution confers no judicial power to revise it. Originalists feel no need to defend the Constitution. They accept it as the document that has governed the destiny of the nation. Perry fleetingly refers to "one" aspiration, "governance that is . . . accountable to the polity," that is, "representative government,"²⁷⁴ or "democracy." Earlier he considered policymaking by "elected representatives" to be "axiomatic; it is judicial review, not that principle that requires justification."²⁷⁵

268. *Id.* at 592.

269. For six confirmatory case studies, see Berger, *supra* note 219, at 755-66.

270. Perry, *supra* note 9, at 565.

271. *Id.* at 566. Perry notes that "the constitutional text conceived as symbolic of the tradition's aspirations [is] significantly less constraining than the constitutional text conceived in originalist terms." *Id.*

272. *Id.* at 565. Perry quotes Dean Sandalow: "the limits are not those imposed by the language and pre-adoption history of the Constitution. The limits, so far as they exist, are those that have developed over time in the ongoing process of evaluation [by the Court] in the name of the Constitution." *Id.* at 568 n.62. This is to say they are judicially created "limits." Perry acknowledges that "the accepted norms of judicial behavior" are not "very significant restraints." *Id.* at 566.

Sandalow counsels: "In assessing the latitude available for shaping constitutional law to current values . . . it is well to recall . . . Marshall's pregnant phrase [it is] 'a constitution we are expounding.'" *Id.* at 568 n.62. However, when Marshall came to explain that phrase he repudiated any reading of *McCulloch v. Maryland* as a "latitudinous" or "liberal construction," and declared that the Court may not assert "a right to change that instrument." JOHN MARSHALL'S *DEFENSE OF MCCULLOCH V. MARYLAND* 92, 209 (G. Gunther ed. 1969).

273. Perry, *supra* note 9, at 556.

274. *Id.* at 577.

275. M. PERRY, *supra* note 89, at 9.

So too, he pointed out that "majoritarian democracy is . . . the core of our entire system."²⁷⁶ To the Americans of 1776, their assemblies were "in fact to be the government," and "[n]o one," wrote Gordon Wood, "doubted that the legislature was the most important part of any government."²⁷⁷ During this period, representative government was equated with democracy. Against this background, an authorization to the "unaccountable" judiciary to revise the Constitution would indeed have been a "remarkable delegation" of constitutional authority.²⁷⁸

But, Perry urges, the American tradition has "aspired to 'liberty and justice for all,' as well as to 'popular sovereignty.'"²⁷⁹ Blackstone had defined "the personal liberty of individuals" as encompassing "the power of locomotion, of . . . moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."²⁸⁰ When James Wilson read this definition to the House in 1866,²⁸¹ he attested that the meaning of "liberty" remained the same. The American Whigs had broadened the concept, and for them, Wood observed, "participation by the people in the government was what the Whigs commonly meant by political or civil liberty."²⁸² A celebrated colonist aphoristically stated, "liberty in a State is self-government." Wood concluded that "[i]ndividual liberty and the public good were easily reconcilable because the important liberty in the Whig ideology was public or political liberty."²⁸³ For the Founders, "individual rights, even the basic civil liberties that we consider so crucial, possessed little of their modern theoretical relevance when set against the will of the people."²⁸⁴ As Wood put it, "[i]t was conceivable to protect the common liberties of the people against their ruler, but hardly against the people themselves."²⁸⁵ The "aspiration" to liberty, therefore, was not a counterweight to representative government, but was subsumed therein.

"[J]ustice," Perry considers, is "[a] central aspiration of the tradition," symbolized "by the various constitutional provisions regarding individual rights."²⁸⁶ These provisions were meager indeed. In the body of the Constitution they largely concerned property, which apparently was the most "sacred" right.²⁸⁷ The Bill of Rights added little—freedom of speech, religion, and assembly, freedom from

276. *Id.* at 125.

277. G. Wood, *supra* note 128, at 163, 162. In "a republican [form of government]," Madison said, "the legislative authority necessarily predominates." *THE FEDERALIST* No. 51, at 338. In the Convention Roger Sherman stated that the legislature "was the depository of the supreme will [of the people]." 1 M. FARRAND, *supra* note 24, at 65. Justice Brandeis referred to the deep-seated conviction of the English and American people that they "must look to representative assemblies for the protection of their liberties." *Myers v. United States*, 272 U.S. 52, 294-95 (1926) (Brandeis, J., dissenting).

278. Such authorization, Perry remarks, would have been "a remarkable delegation for politicians to grant to an institution like the Supreme Court, given the electorate's long-standing commitment to policy making . . . by those accountable, unlike the Court, to the electorate." M. PERRY, *supra* note 89, at 20.

279. Perry, *supra* note 9, at 577.

280. 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 134 (1765-1769).

281. *CONG. GLOBE* 39th Cong., 1st Sess. 1118 (1866).

282. G. Wood, *supra* note 128, at 24-25.

283. *Id.* at 61.

284. *Id.* at 63.

285. *Id.*

286. Perry, *supra* note 9, at 577.

287. For citations, see Berger, *supra* note 219, at 751, 753 n.8.

unreasonable searches, from quartering of soldiers in private houses, the right to bear arms, various procedural rights in criminal proceedings, and trial by jury in civil proceedings. The Founders were preoccupied with setting up a structure of government that would limit and diffuse delegated power, not in fortifying individual rights. They had "confidence," Wood commented, "in constitutionalism, in the efficacy of institutional devices for solving social and political problems."²⁸⁸ The "individual rights" Perry champions are, as he admits, judicial constructs of the "modern" Court.²⁸⁹ His appeal to "justice," as symbolized by constitutional individual rights, is therefore an appeal to the justice fashioned by the modern Court rather than to a central aspect of the tradition.

"What is Justice?" Plato asks.²⁹⁰ Brest correctly answers that "conceptions of justice . . . depend on *who* is doing the interpreting or moral philosophizing."²⁹¹ Certainly there is no basis for tying "justice" into the Constitution; it is not even mentioned in the index to the records of the Convention. There James Wilson stated that "[l]aws may be unjust . . . and yet not be . . . unconstitutional."²⁹² In our own time, Felix Frankfurter wrote that justice is not the "test of constitutionality."²⁹³ Perry himself acknowledges that "one's sense and vision of justice may change"; that "at any given point in the course of the tradition there have been competing visions of the requirements of justice, . . . [and] that various considerations of self-interest have powerfully distorted the visions and pursuit of justice."²⁹⁴ How can such ever-shifting and competing visions of justice weigh against the representative government that is solidly embedded in the very text of the Constitution? Perry candidly recognizes that "a less constrained judicial role is more problematic than a more constrained one in terms of the aspiration to representative government. . . . There is, however, that other constitutive aspiration—to justice. My suggestion, . . . concededly is speculative, but speculation is all we have to go on here."²⁹⁵ If speculation is "all we have to go on here," it is greatly outweighed by the indubitable, concretely expressed aspiration to representative government, to "electorally accountable" delegates that are the "core" of our democratic system.

3. *The Argument from Contract*

Perry's discussion of the anti-activist "argument from contract" mistakenly conceives an "originalist" understanding that the Constitution is "a sort of (social)

288. G. WOOD, *supra* note 128, at 517. "In the convention and later, states rights—not individual rights—was the real worry." A. MASON, *THE STATES RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION* 75 (1964).

289. "Unless there is a functional justification" for expansive judicial review "in human rights cases, virtually all of constitutional doctrine regarding human rights fashioned by the Supreme Court in this country must be adjudged as illegitimate." M. PERRY, *supra* note 89, at 91–92. Brest acknowledged that "[m]any of what we have come to regard as the irreducible minima of rights are actually supra-constitutional; almost none of the others are entailed by the text or original understanding." Brest, *supra* note 1, at 236.

290. H. SMITH, *MAN AND HIS GODS* 154 (1952).

291. Brest, *supra* note 8, at 663 (emphasis in original).

292. 2 M. FARRAND, *supra* note 24, at 73.

293. Frankfurter, *Can the Constitution Guarantee Toleration?*, 43 *NEW REPUBLIC* 85, 87 (1925) (quoted in W. MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT ON THE COURT* 54 (1961)).

294. Perry, *supra* note 9, at 577, 582.

295. *Id.* at 580.

contract (1) between the states and the national government, (2) among the three branches of the national government, and (3) between the people and those who govern them.”²⁹⁶ There could not have been any contract between the states and the as yet nonexistent national government. A contract requires at least two parties, as James Wilson emphasized in the Pennsylvania Ratification Convention: “There can be no compact unless there are more parties than one. . . . ‘The convention was forming compacts!’ With whom?”²⁹⁷ So too, neither the branches nor the federal government existed until called into being under the Constitution. Wilson further explained:

This, Mr. President, is not a government founded upon compact; it is founded upon the power of the people. They express in their name and their authority, “*We the people do ordain and establish*,” . . . from their ratification alone, it is to take its constitutional authenticity. . . . [T]he system itself tells you what it is; it is an ordinance and establishment of the people.²⁹⁸

In North Carolina, James Iredell stated that a constitution is “a [*delegation*] of particular powers by the people to their representatives, for particular purposes. It may be considered as a great *power of attorney*, under which no power can be exercised but what is expressly given.”²⁹⁹ A power to sell a mule does not authorize sale of the barn. Hamilton recognized this concept: “[A]n agent cannot new model the terms of his commission.”³⁰⁰ Talk of “contract” merely muddies the main issue: whether judges may exceed their delegated powers.³⁰¹

4. The “Sacred Text” Analogy

Before seeking guidance from biblical interpretation, Perry comments on what some have perceived as “the similarities between legal interpretation and literary interpretation.”³⁰² Perry dismisses the analogy (1) because readers do not form an “interpretive community,” (2) because “the literary text is not normative,” and (3) because such texts are generally “the work of particular authors” rather than the “artifacts of the [religious] tradition.”³⁰³ A simpler explanation is that no reader is restrained from assigning to the words of a novel such meaning as he will. The Constitution, on the other hand, was drawn by Framers fearful of power, who defined and limited it. Their design would be frustrated were all readers free to interpret the Constitution according to their own fancies.

296. *Id.* at 583.

297. 2 J. ELLIOT, *supra* note 125, at 497.

298. *Id.* (emphasis added).

299. 4 J. ELLIOT, *supra* note 125, at 148 (emphasis added). Richards opines that the Framers of the Constitution adhered to a “contractarian moral idea of community that actuates” the Constitution. Richards, *supra* note 79, at 526. But one will vainly search the records of the Convention for the remotest hint of this. Perry justly says that this claim “utterly lacks persuasive evidentiary support,” that there is no evidence that the framers of the fourteenth amendment “were similarly adherents of that philosophy.” M. PERRY, *supra* note 89, at 108.

300. 6 A. HAMILTON, WORKS 166 (H. Lodge ed. 1904).

301. So it was perceived by Hamilton: “[e]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.” THE FEDERALIST No. 78, at 505 (Mod. Lib. ed. 1937).

302. Perry, *supra* note 9, at 561.

303. *Id.* at 562.

Perry's preference for biblical over literary interpretation, because he finds "some striking and illuminating similarities between the constitutional text and religious texts,"³⁰⁴ appears to wander far afield. The text and authorship of the Constitution are unimpeachable; far different are those of the New Testament. We "have no certain knowledge as to how or where the fourfold Gospel Canon came to be formed."³⁰⁵ There "existed in the second century more than fifty" gospels or writings "purporting to describe the words and acts of Jesus."³⁰⁶ From earliest times there were "very extensive variations" in the Gospels, so that they "form a textual problem."³⁰⁷ Only in the middle of the fourth century did the Church formulate an accepted version.³⁰⁸ Consider the difficulty the Church Fathers faced in sorting out the various versions across a gap of 350 years, twice the period that separates us from the adoption of the Constitution. Then too, scholarship over the past two hundred years has illuminated the uncertain basis of the bulk of Christian doctrine.³⁰⁹ Evidently "the true authority of the New Testament could not be that of a legal code which is definite in all its parts."³¹⁰

When Perry summons the "tradition" of a religious community,³¹¹ we are entitled to ask which tradition he means. In the teaching of the Roman Catholic Church, the authority of the Church transcends that of Scripture. Augustine "declared that he would not believe the scriptures themselves except as moved to do so by the authority of the Church."³¹² For the Protestants, on the other hand, the Bible was the ultimate, the "inspired authority in faith and morals."³¹³ Protestants have differed as vigorously about their various readings as had the Catholics.³¹⁴ Christianity "has passed through too many changes, and it has found too many

304. *Id.* at 557.

305. 3 *ENCYCLOPAEDIA BRITANNICA*, *Bible*, at 513 (14th ed. 1929). The 1961 edition is identical in almost all relevant respects.

306. H. SMITH, *supra* note 290, at 181; 3 *ENCYCLOPAEDIA BRITANNICA*, *Bible*, at 515-19 (14th ed. 1929).

307. 3 *ENCYCLOPAEDIA BRITANNICA*, *Bible*, at 519 (14th ed. 1929).

308. *Id.* at 514; Smith, *supra* note 290, at 181.

309. The bitter, prolonged debate about the nature of the Godhead—Father, Son and Holy Ghost—indicates that small illumination is to be gained from Catholic theology. Committed to monotheism, the theologians were forced "to struggle with a one-god who was also three gods." H. SMITH, *supra* note 290, at 219. The Nicene Council ruled in favor of the now-orthodox formula of Bishop Alexander: "the son is present in God, without birth, ever-begotten, an unbegotten-begotten. . . . They are two, for the Father is the Father, and the Son is not the same . . . but their nature is one, for the Begotten is not dissimilar to the Begetter." *Id.* at 222-23. Gibbons commented, "the incomprehensible mystery which excites our adoration eludes our inquiry." 2 E. GIBBONS, *HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* 496 (Nottingham Soc. undated). And he noted that "the most sagacious of Christian theologians, the great Athanasius himself, has candidly confessed that whenever he forced his understanding to meditate on the divinity of the *Logos*, his toilsome and unavailing efforts recoiled on themselves: that the more he thought, the less he comprehended." *Id.* at 480; see also H. SMITH, *supra* note 290, at 227. "It is apparent," the *Britannica* concluded, "that such a doctrine as the Trinity is itself susceptible of many explanations." 5 *ENCYCLOPAEDIA BRITANNICA*, *Christianity*, at 633 (14th ed. 1929).

310. 3 *ENCYCLOPAEDIA BRITANNICA*, *Bible*, at 522 (14th ed. 1929).

311. Perry, *supra* note 9, at 557.

312. H. SMITH, *supra* note 290, at 244. The "Church determines doctrine. . . . Its authority is accompanied by the spirit of God, who guides it into truth and gives it miraculous power." 5 *ENCYCLOPAEDIA BRITANNICA*, *Christianity*, at 635 (14th ed. 1929). "The faithful . . . had come to believe in the Church rather than the Gospel." G. WILLS, *BARE RUINED CHOIRS: DOUBT, PROPHECY, AND RADICAL RELIGION* 31 (1972).

313. 5 *ENCYCLOPAEDIA BRITANNICA*, *Christianity*, at 635 (14th ed. 1929); 3 *ENCYCLOPAEDIA BRITANNICA*, *Bible*, at 521 (14th ed. 1929).

314. Hilary, Bishop of Poitiers, noted in the middle of the fourth century "that there are as many creeds and opinions among men, as many doctrines as inclinations, . . . because we make creeds arbitrarily, and explain them arbitrarily." 2 E. GIBBONS, *supra* note 309, at 500.

interpretations possible"³¹⁵ to afford a single reliable "tradition." In sum, the New Testament is a text of uncertain origin, whereas the provenance of the Constitution is indisputable. The constitutional boundaries of the judicial role were virtually unquestioned for 175 years, whereas many of the central dogmas of the Christian tradition have been hotly disputed. For centuries the Catholic Church asserted its own authority over that of the Bible, whereas the Constitution has known no superior. The most cursory readings in historical Christianity, it seems to me, render that "tradition" utterly unfit to serve as an aid in construction of the Constitution.

B. D.A.J. Richards' Theory of "Interpretation and Historiography"

Richards devotes eleven of the sixty pages of his article³¹⁶ to a recapitulation of his book review of my *Death Penalties: The Supreme Court's Obstacle Course*³¹⁷—without taking account of my response.³¹⁸ Apparently he believes that his book review deserves to be preserved under glass. Not content to expose my grave errors, Richards charges me with "abuse of critical historiography," with an "extremely confined and narrow use of history . . . concentrat[ing], for example on the *congressional debates* over the proposed fourteenth amendment," and with fashioning a "mythology of Founders' intent."³¹⁹ If he refers to the facts, the "irrefutable" evidence that suffrage was excluded from the fourteenth amendment removes it from the realm of "mythology." Wrapped in a philosophical cocoon, Richards states, "it is not a reasonable construction of the abstract language employed to limit it forever to its historic denotations,"³²⁰ utterly oblivious to the long-established rule that the intention of the lawmaker prevails over the letter of the law.³²¹ That rule is not "mythological."

Unwittingly, Richards has furnished some valuable confirmation for the use of the original intention: "Interpretation in the arts . . . requires a sense of the history of the art (e.g., *performing practice* in Mozart's time or the conventions of Handelian opera seria)." Without those "historical conventions," "[p]erformance will, at best, abuse the work, in some sense failing to interpret the work."³²² By "performing practice," Richards presumably refers to such matters as whether a trill begins on the top or bottom note, or whether a grace note fleetingly precedes the next note or is to

315. 5 *ENCYCLOPAEDIA BRITANNICA*, *Christianity*, at 637 (14th ed. 1929).

316. Richards, *supra* note 79, at 490.

317. Richards, Book Review, 71 *CALIF. L. REV.* 1372 (1983).

318. Berger, *A Response to D.A.J. Richards' Defense of Freewheeling Constitutional Adjudication*, 59 *IND. L.J.* 339 (1984).

319. Richards, *supra* note 79, at 512, 517 (emphasis added). Congressional debates are a prime source of legislative history.

320. *Id.* at 507.

321. Richards, *supra* note 79, at 509. He would "hesitate to use . . . Founders' intent . . . to undercut tradition of judicial review over time," when in fact, that tradition has long given effect to the "Founders' intent." *Id.* Here as elsewhere Richards relies on empty rhetoric, ignoring the historical facts to the contrary.

322. *Id.* at 523. Richards does not wear his learning lightly: the "struggle to revive lost conventions" will enable us to relish "Monteverdi's three extant operas" and Handel's *Tamerlano*. *Id.* The gentle reader who may feel chagrined by his unfamiliarity with works that drop so casually from Richards' lips may be consoled by my shamed-faced confession that although I spent the first thirty years of my life in the practice of classical music, and at age sixty strove to recapture the thrill of my sinful past by playing a violin recital in Vienna, I too never heard of *Tamerlano*.

be given half its value. Suppose that instead of reconstructing the "historical conventions" of Mozart's time we had his own plainly expressed explanation of how he intended to have a trill and grace note performed. Would Richards reject Mozart's "original intention"? In the frame of his reasoning it would be manifestly arbitrary to do so; how then would he distinguish the Framers' clear explanations of their own words?

Richards' article richly exemplifies what is wrong with much of activist theorizing.³²³ His convoluted writing swaddles the simplest act in murky rhetoric. Let one example suffice: as a preliminary to the task of constitutional interpretation, he writes: "[C]onsider the interpretation of walking down the street. Our interpretation of this action rests on a form of holistic, viz. nonreductive explanation in which such factors as the person's rationality, beliefs, desires, capacities, and the like appear as mutually interdependent variables."³²⁴ That is enough to inhibit a person from taking another step.

To those judges and lawyers to whom, like Chief Justice Marshall, "abstract theorizing was never congenial,"³²⁵ let me offer a grain of comfort—they are in the mainstream of the English legal tradition which has ever preferred the particular to the sweeping generalization.³²⁶ Goethe considered that "philosophical speculation is an injury to the Germans, as it tends to make their style vague, difficult, and obscure." He preferred "the common sense point of view" to that of philosophy.³²⁷ Similarly, Justice Story declared that

[c]onstitutions are not designed for metaphysical or logical subtleties, . . . for elaborate shades of meaning, or for the exercise of philosophical acuteness. . . . The people made them; . . . [and] must be supposed to read them, with the aid of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.³²⁸

The time has come to abandon obscurantist jargon and talk to lawyers in their own language of legal discourse.

As one of the few activist efforts to discredit originalism on historical grounds,³²⁹ Richards calls for close examination. His "alternative model of interpretation . . . focuses on abstract principles concerning . . . prohibition of unnecessary harshness in criminal sanctions (eighth amendment), and general requirements of equal dignity (fourteenth amendment)," resting on the argument that the language of the "cruel and unusual punishment" and "equal protection of the laws" clauses "is itself abstract."³³⁰ But the 1866 framers repudiated a "latitudinarian" interpretation going beyond certain "specific rights"; they repeatedly rejected

323. Activist Ira Lupu remarked, "[c]onstitutional scholars have, of late, talked mainly to each other. . . . [T]he time has come for us to look outside ourselves to the audiences of judges, lawyers, legislators, and the public." Lupu, *Constitutional Theory and the Search for a Workable Premise*, 8 U. DAYTON L. REV. 579, 580 (1983).

324. Richards, *supra* note 317, at 1375.

325. F. FRANKFURTER, *THE COMMERCE CLAUSE* 15 (1937).

326. *See supra* note 79.

327. J. ECKERMANN, *supra* note 79, at 64, 293.

328. 1 J. STORY, *supra* note 182, § 451, at 345.

329. *See supra* note 132.

330. Richards, *supra* note 79, at 506.

attempts to ban *all* discriminations and unmistakably left in place discrimination respecting suffrage and segregation.³³¹ Thaddeus Stevens, leader of the Radicals who sought equality for the blacks, concluded that the amendment "falls far short of my wishes," but "it is all that can be obtained in the present state of public opinion."³³² The chairman of the Joint Committee on Reconstruction, Senator William Fessenden, stated, "we cannot put into the Constitution, owing to existing prejudices and existing institutions, an entire exclusion of all class distinctions."³³³ How can Richards transform "equal protection" into a broad "abstract principle" in the teeth of these facts? What are the "background rights, more abstract considerations" to which "the Herculean interpreter must appeal"?³³⁴ Drafters do not use words to defeat their purposes.

Justice Bradley, who was close in time to the enactment of the fourteenth amendment and who fully appreciated the aims of the framers, declared that the Civil Rights Act sought to secure "to all citizens of every race and color, the same privileges as white citizens enjoy, and not to modify or enlarge the latter."³³⁵ Justice Bradley, we have seen, held that the Civil Rights Act "covers the same ground as the Fourteenth Amendment." Such is the history Richards brands as "mythological." To conclude in the face of the facts that the "fourteenth amendment *decisively* introduces" . . . "abstract ideals of equal respect for human dignity"³³⁶ is to step through the looking-glass, leaving behind denial of suffrage, continuation of segregation, and the bulk of untouched discrimination.

Richards' deficiencies as an historian are demonstrated by his treatment of the "cruel and unusual punishment" clause, which he translates into a "prohibition of unnecessary harshness." The clause is first met in the English Bill of Rights of 1689. In the one hundred years that intervened before the clause was embodied in the eighth amendment of our own Bill of Rights, England and the colonies had punished many offenses with death penalties, a practical construction that the clause did not preclude death penalties unaccompanied by torture. Hugo Bedau, a zealous crusader for abolition of death penalties, wrote in 1968 that death penalties

are not unconstitutional under the eighth amendment because however cruel and unusual they may now be, they are *not more* "cruel" and *not more* "unusual" than were those that prevailed in England and the Colonies two or three hundred years ago. An unbroken line of interpreters have held that it was the original understanding and intent of the framers of the eighth amendment . . . to proscribe as "cruel and unusual" *only* such modes of execution as compound the simple infliction of death with added cruelties or indignities.³³⁷

331. See *supra* text accompanying notes 140-49, 167-72; see also R. BERGER, *supra* note 6, at 163-65.

332. CONG. GLOBE 39th Cong., 1st Sess. 2459 (1866).

333. *Id.* at 705.

334. Richards, *supra* note 79, at 502.

335. Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F.Cas. 649, 655 (C.C.D. La. 1870).

336. Richards, *supra* note 79, at 513 (emphasis added).

337. Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 229 (emphasis in original). In the Virginia Ratification Convention, Judge Pendleton said that Montesquieu and other commentators "properly discard from their system all the severity of cruel punishment, such as torture, inquisitions and the like—shocking to human nature." 3 J. ELLIOT, *supra* note 19, at 294. And Patrick Henry stated that our ancestors "would not admit of tortures, or cruel and barbarous punishments." *Id.* at 447.

When the clause was picked up by the eighth amendment it was accompanied by the fifth amendment provision that a person may not be deprived of life without due process, thus recognizing that one may be deprived of life after a fair trial; a circumstance which an opponent of death penalties, Sanford Levinson, calls a "devastating fact."³³⁸ Thereafter, the first Congress, which drafted the eighth amendment and therefore best knew whether it banned death penalties, enacted the Act of April, 1790, making murder, robbery, and the like punishable by death.³³⁹

It would unduly burden these pages to recapitulate my detailed refutation of Richards' attempts to escape the force of this history, so I shall confine myself to a few points that abundantly demonstrate his inability to weigh historical evidence.³⁴⁰ First, Richards compares me unfavorably with John McManners. Originally he praised McManners' "broad survey of changing attitudes to death . . . in eighteenth century France," which he expressed in

reformist skepticism about the . . . use of the death penalty. . . . This skepticism is likely to have affected the American Enlightenment and constitutionalism through the writings of Beccaria. . . . Though these arguments did not lead them to question the death penalty as such, the arguments did suggest real moral concern with the death penalty.³⁴¹

Those concerns fell on deaf ears, as the fifth amendment and the Act of 1790 demonstrate. Apparently aware that his concessions were damaging, Richards now makes a fuzzier approach, objecting that emphasis on the fifth amendment and the Act of 1790 would "constitutionalize a historically contingent fact without fairly reading the background principles, understandings and contexts that explain the fact and, indeed, sharply qualify its meaning."³⁴² To Richards, these all became "implicit in the principles of the eighth amendment."³⁴³ What a deduction! Although the perpetuation of death penalties by the fifth amendment and the Act of 1790 runs squarely counter to McManners-Beccaria, those enactments are "sharply qualified" by the McManners "background principles." This might pass for reasoning in philosophical circles, but it will astonish many a lawyer.

Second, to illustrate my "extremely confined and narrow use of history"—my reliance "on the congressional debates"—Richards contrasts Harold Hyman's supplementation of the 1866 debates on the fourteenth amendment with the "clarifying analyses of the political and social history of Reconstruction."³⁴⁴ Richards insists that "the fourteenth amendment must be understood in the context of the egalitarian purposes of the thirteenth amendment and the larger moral aspirations

338. Levinson, *Wrong But Legal?*, NATION, February 26, 1983, at 248, 249.

339. Ch. 9, 1 Stat. 115, 139 (1790). "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions." *Hampton Co. v. United States*, 276 U.S. 394, 412 (1928).

340. For example, Richards cites to a "Brief for Petitioner" in a murder appeal for his historical views, Richards, *supra* note 317, at 1394 n.16, unaware that "law office history" is heavily discounted. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155-56; Tushnet, *supra* note 6, at 793.

341. Richards, *supra* note 317, at 1390-91.

342. Richards, *supra* note 79, at 514.

343. *Id.* at 515.

344. *Id.* at 512.

of the abolitionist movement."³⁴⁵ However, he overlooks the rule that the specific prevails over the general, in particular, that the allegedly "broad" purposes of an earlier amendment must yield to the specific, narrow purposes of the latter.³⁴⁶ Unquestionably, some proponents appealed to the thirteenth amendment for constitutional authority to enact the Civil Rights Act of 1866, which prohibited discrimination respecting the rights to contract, to own property, and to have access to the courts. But there was vigorous opposition, and the fourteenth amendment was adopted to supply what the majority considered the thirteenth did not.³⁴⁷ Roscoe Conkling declared that "[e]mancipation vitalizes only natural rights, not political rights."³⁴⁸ Senator Henry Wilson, a Massachusetts Radical, said that the thirteenth amendment "was never understood by any man in the Senate or House . . . to confer upon Congress the right to proscribe or regulate suffrage. . . . If it had been supposed that it gave that power the amendment would never have passed Congress."³⁴⁹ Senator Edmund Cowan of Pennsylvania stated that the thirteenth amendment was understood merely "to liberate the negro slave from his master."³⁵⁰ Hyman himself recognized "a large stream of constitutionalism . . . [within which] the thirteenth amendment diminished the states' power not one whit beyond abolition."³⁵¹

As to Hyman's "larger moral aspirations of the abolitionist movement," C. Vann Woodward noted that during the war years "the great majority of citizens in the North still abhorred any association with abolitionists."³⁵² David Donald, a Reconstruction historian, wrote that racism "ran deep in the North," and the suggestion that "Negroes should be treated as equals to white men woke some of the deepest and ugliest fears in the American mind."³⁵³ Senator Cowan ridiculed the notion that the "antipathy that never sleeps, that never dies, that is unborn, down at the very foundation of our natures," is "to be swept away by . . . the reading of half a dozen reports from certain abolitionist societies."³⁵⁴ Hyman should explain why Stevens' and Fessenden's frank recognition of the fourteenth amendment's limited goals, taking into account the framers' repeated rejection of a ban on *all* discriminations, must yield to the "egalitarian" principles of the thirteenth amendment. Under Hyman's theory the labors of the 39th Congress were gratuitous: "egalitarianism"

345. *Id.*

346. "Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932). "[A]n old statute gives place to a new one." 1 *Bl.* 89. Given two conflicting statutes, said Hamilton, the rule is that "the last in order of time shall be preferred to the first." *THE FEDERALIST* No. 78, at 507 (Mod. Lib. ed. 1937).

347. The draftsman of the fourteenth amendment, John Bingham, insisted that the lack should be remedied by "amending the Constitution . . . expressly prohibiting the States from any abuse of power in the future." *CONG. GLOBE* 39th Cong., 1st Sess. 291 (1866). *United States v. Harris*, 106 U.S. 629 (1882) rejected the notion that "under a provision of the Constitution which simply abolished slavery . . . we should, . . . invest Congress with power over the whole catalog of crimes . . . by which the right of any person to life, property, or reputation is invaded." *Id.* at 643.

348. *CONG. GLOBE* 39th Cong., 1st Sess. 356 (1866).

349. *Id.* at 1255.

350. *Id.* at 499.

351. H. HYMAN, *A MORE PERFECT UNION* 428 (1973).

352. C. WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 73 (1960).

353. *See supra* note 233.

354. *CONG. GLOBE* 39th Cong., 1st Sess. 343 (1866).

had been supplied by the thirteenth amendment. Be it assumed that the Radicals in Congress carried the abolitionist flag, Hyman's disciple, M.L. Benedict, concluded that "the nonradicals had enacted their program with the sullen acquiescence of some radicals and over the open opposition of many," testimony that the larger moral aspirations of the abolitionist movement exercised little influence.³⁵⁵

If Richards is to qualify as an expert on constitutional construction, he must learn to exclude considerations that confessedly did not influence the drafters, and to discard remarks outside the halls of Congress that contradict what the members of Congress said in the course of the debates on the amendment. Let him cite *one* case in which it was held that remarks outside Congress overcame the legislative history. His notion that to concentrate on what the framers said and did constitutes "not only an abuse of constitutional law, but an abuse of critical historiography as an intellectual discipline,"³⁵⁶ merely betrays his ignorance of settled principles of construction.

Third, consider his attack upon my reliance on the popular will as an "indefensible positivistic conception of popular sovereignty," because it cannot explain "how there can be any legal limits on the sovereign."³⁵⁷ The Founders, among them John Adams and James Wilson,³⁵⁸ did not regard the *state* as sovereign: "if sovereignty had to reside somewhere in the State, . . . then many Americans concluded that it must reside only in the people at large."³⁵⁹ "Unless the people were considered as vitally sovereign," said Wilson, "we shall never be able to understand the principle on which this system was constructed."³⁶⁰ Such facts are thrust aside by Richards because they "fictionalize a kind of sovereign who imposes limits on the state, but is itself unlimited, namely, the people, or popular sovereignty"; that, he argues, is "a far cry from . . . British parliamentary supremacy."³⁶¹ So it is, but as James Iredell pointed out, the Founders rejected the conventional British "theory of the necessity of the legislature being absolute in all cases."³⁶² In so doing, they did not reject the concept of sovereignty, they merely relocated it, as Wilson said, "in the PEOPLE, as the fountain of government."³⁶³ To label this a "futile and disfiguring search for or invention of a fictionalized sovereign"³⁶⁴ exemplifies how delusory is a philosophy divorced from fact. If "popular sovereignty" was an "invention," so was judicial review itself, for the times demanded invention.³⁶⁵ Richards is welcome to dismiss as a "fiction" what the Massachusetts General Court regarded as a

355. M. BENEDICT, *A COMPROMISE OF PRINCIPLE* 210 (1974).

356. Richards, *supra* note 79, at 512.

357. *Id.* at 509.

358. Adams referred to the prevalent idea: The people were the "[s]ource of all authority and Original of all Power." G. WOOD, *supra* note 128, at 329. Wilson said that "all Government originates from the People," a "maxim widely accepted by almost everyone." *Id.* at 330.

359. G. WOOD, *supra* note 128, at 382.

360. *Id.* at 530.

361. Richards, *supra* note 79, at 509-10, (emphasis added).

362. G. WOOD, *supra* note 128, at 462.

363. *Id.* at 530.

364. Richards, *supra* note 79, at 510.

365. See *supra* text accompanying notes 253-54.

maxim—that the absolute power “resides always in the body of the people”³⁶⁶—but let him not seek to be regarded as an historian.

He concedes that “[a]s political theory, popular sovereignty has long enjoyed a central place in intuitive moral conceptions of constitutional legitimacy,”³⁶⁷ but he urges that it fails to tell why a contemporary generation should “be bound . . . to the will of a generation long dead”³⁶⁸—the same old refrain. It drips with hypocrisy, for activists appeal to the Court for what they well know this generation will not grant to them, for example, a bar to school prayer, death penalties, and the like. Ostensibly fighting for the rights of this generation, Richards would in fact deprive them of the right to rule their own destiny by turning decision of large policy matters over to the Court.

Last, the foregoing remarks by no means exhaust the list of Richards’ flawed ahistorical pronouncements. These are fully treated in my response. Whatever his merits as a philosopher, when it comes to constitutional history, I would counsel, “Shoemaker, stick to your last.”

C. John McArthur’s Theory of Interpretivism

My concurrence in McArthur’s critique of activist theorizing may lead the reader to think that his criticism of my views also has my endorsement. Incisive and telling in dissecting activism, McArthur falters when he turns to interpretivism. What he describes as the “niggardly intent” that I ascribe to the framers of the fourteenth amendment, my supposed “narrow interpretivism,” has already been discussed in this Article.³⁶⁹ Although he observes that “written law is the barrier between law and politics” and that activists are “attempting to replace one moral system with another that they prefer,”³⁷⁰ McArthur is unaware of his own ambivalence on that score. Consider his approach to the desegregation case, where he opined that Berger’s reading “leaves no room in the interpretivists’ camp for such standard applications of the fourteenth amendment as the school desegregation cases.”³⁷¹ Not that he entirely approves of those cases, for he criticizes the Court for its combination of a “cursory description of the role of schools with an even more cursory summary of modern psychological theories, and [its prohibition of] separate schools for the pragmatic reason that the schools could not be made equal,” going to great lengths “to avoid revealing the real basis of its decision,” namely, “the moral principle . . . that racial distinctions have no place in a just society.”³⁷² Apparently that principle has his approval. But it was not the moral principle upon which the framers of the

366. In January 1776 the Massachusetts General Court declared: “It is a Maxim, that, in every Government there must exist Somewhere, a Supreme Sovereign, absolute and uncontrollable Power. But this power resides, always in the body of the People.” G. Wood, *supra* note 128, at 362. By 1788 Noah Webster considered it “a fundamental maxim of American politics . . . the sovereign power resides in the people.” *Id.*

367. Richards, *supra* note 79, at 510.

368. *Id.* at 511.

369. McArthur, *supra* note 9, at 293; see *supra* text accompanying notes 165–72.

370. McArthur, *supra* note 9, at 313, 324 n.173.

371. *Id.* at 282 n.7.

372. *Id.* at 288 n.37.

amendment acted; and blacks think that whites still are not prepared to accept it. As we have seen, a growing number of activists acknowledge that the framers excluded segregation from the amendment;³⁷³ indeed, such knowledge is the mainspring of the activist flight from the Constitution. Instead of controverting the evidence, McArthur prefers his own moral system to that of the framers, the very thing he condemns in the activists.

It is not enough for McArthur to say that the "common weakness" of traditional textual and historical analysis is that "they are rarely conclusive."³⁷⁴ What of the case in which they *are* conclusive, what Justice Harlan rightly affirmed was the "irrefutable" exclusion of suffrage from the fourteenth amendment, reversed by the Court in its reapportionment decisions? Does not such a glaring judicial revision of the Constitution call for comment? In averting his eyes from the glare, McArthur aligns himself with the activists, who studiously have avoided such comments. In the main, McArthur views the interpretivist position in negative rather than positive terms. One suspects that he has a sneaking attachment to activism; witness his approval of the desegregation cases' "moral principle." Although he correctly considers that activists should "bear the burden" of upholding their rejection of the "traditional conception of American democracy," he weakly concludes that "the interpretivist Court may remain the best choice among evils."³⁷⁵ Nowhere does he notice the historical materials which demonstrate that the Founders already made that choice.

In light of McArthur's differentiation between "policymaking" and "textual adjudication,"³⁷⁶ it is difficult to credit his statement that "[t]he charge of policymaking is a political accusation, and it rests upon a particular conception of how much discretion is proper for the Court."³⁷⁷ On the contrary, the accusation is derived from the Constitution: (1) the Framers excluded the judges from policymaking; (2) they had a "profound fear of judicial independence and discretion" and sought to confine it;³⁷⁸ and (3) from the beginning the Court disclaimed power to make law, that is, to engage in policymaking. I therefore dissent from McArthur's view that "[t]he fundamental disagreement is over the role the Court *should* play. This political question cannot be settled by exegesis"³⁷⁹ Since the Court enjoys only that power the Constitution confers, the scope of its power, I consider, is a legal-constitutional, not a political, question. Like Marshall we must look to the Constitution, not politics, for the answer.

It is surprising to find myself in a "list of converts to noninterpretivism" which includes "conservative academics who continue to condemn the Warren Court."³⁸⁰ McArthur adds that "[t]he conservative theorists are delighted to have liberal

373. See *supra* note 6.

374. McArthur, *supra* note 9, at 306.

375. *Id.* at 329, 325.

376. *Id.* at 300, 313.

377. *Id.* at 319.

378. G. Wood, *supra* note 128, at 298.

379. McArthur, *supra* note 9, at 320.

380. *Id.* at 303-05.

company, as is made clear by Berger's praise for Perry's interpretive analysis as that of 'virtually the first activist apologist to face up unflinchingly to the adverse historical facts' about the fourteenth amendment."³⁸¹ Surely intellectual candor is still praiseworthy. In politics I am a life-long liberal, not changing my spots because just now "liberal" has become a perjorative term. It is not "conservative" to criticize the Court for *flouting* the Constitution, as when it reads suffrage into the fourteenth amendment and equal protection into the fifth. To the contrary, adherence to the rule of law has been a mainstay of liberalism. "Conservative" and "liberal" should have no place in constitutional analysis, which calls for unbiased effectuation of constitutional commands.

VI. CONCLUSION

A Canadian commentator remarked that "American scholars struggle to offer some theoretically valid account of the jurisprudential enterprise," that they are "energized by a growing sense of desperation,"³⁸² evidenced in part by the cacophony of conflicting theories. Few, if any, activists take account of long-standing judicial approval of doctrines that they would repudiate in the interest of expanding judicial power, for example, the bar against judicial lawmaking, the lawmakers' intention prevails over the letter of the law. Nor do they notice (1) the Founders' dread of the greediness of power,³⁸³ which argues against a blank check to the judiciary; (2) their trust in their legislative assemblies, rather than in the judiciary, which, as Hamilton was constrained to assure them, was "next to nothing"; (3) their attachment to the separation of powers, exemplified by Hamilton's assurance that courts may not "substitute their own pleasure [for] the constitutional intentions of the legislatures."³⁸⁴ Revision of the *Founders'* intention was simply unthinkable. The activists' retort that the Founders may not rule us from their graves merely pleads for judicial rule, for they dare not ask the people to decide whether constitutional limits should be thrown overboard in the interest of government by judiciary.

Why should we reject constitutional limits in favor of a confused medley of activist theories and aspirations that, as in the case of death penalties and school prayer, the people repudiate? Originalism, to borrow from Raymon Aron, "justifies itself by the falseness of the beliefs that oppose it."³⁸⁵ Thomas Grey, who recognized the deep roots of originalism, observed that the opposing view is more difficult to justify.³⁸⁶ Another foe of originalism, Mark Tushnet, observed that the argument for interpretivism is "fairly powerful," that it "is better than the alternatives."³⁸⁷ At the

381. *Id.* at 305 n.108.

382. Hutchinson, *supra* note 10, at 701.

383. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 56-57 (1967).

384. *THE FEDERALIST* No. 78, at 507 (A. Hamilton) (Mod. Lib. ed. 1937).

385. Aron, *Pensees*, N.Y. Times, Oct. 23, 1983, at E19. "[R]efutation of an argument," Chief Justice Thomas McKean told the Pennsylvania Ratification Convention, "begets a proof." 2 J. ELLIOT, *supra* note 125, at 541. This view also was expressed by Fisher Ames in the First Congress, citing the maxim *destructio unius generatio alterius*. 1 ANNALS OF CONGRESS 560 (1789).

386. Grey, *supra* note 15, at 708.

387. Tushnet, *supra* note 6, at 787, 792.

heart of representative government is electoral accountability; legislators can be ousted, whereas judges are unaccountable to the electorate. But, I would not rest upon policy considerations, but upon the Constitution itself, which preserves to the people the power of self-government. My credo is that of Charles McIlwain: "The two fundamental, correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits to arbitrary power and a complete responsibility of government to the governed."³⁸⁸ It weighs heavily against the activists that they do not forthrightly tell the people that they prefer judicial to constitutional governance, presumably "because they know that their alternatives would not be accepted by the public at large."³⁸⁹ That is what this long-delayed inquiry into the nature of "interpretation" is all about. Finally, if, as activists maintain, judges may freely draw on values outside the Constitution, what are the limits on their power? Then, as Marshall declared, a written Constitution is "an absurd attempt . . . to limit a power in its own nature illimitable."³⁹⁰

388. C. McILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 146 (rev. ed. 1947).

389. McArthur, *supra* note 9, at 332. Levinson remarks that "the candid rejection of the traditional constitutional discussion is not yet common, at least in public." Levinson, *Wrong But Legal?*, *NATION*, Feb. 26, 1983, at 248, 249.

390. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

